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Can Secular Feminists and Catholic Feminists Work Together to Ease the Conflict Between Work and Family?

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ARTICLE

CAN SECULAR FEMINISTS AND CATHOLIC FEMINISTS WORK TOGETHER TO EASE THE CONFLICT BETWEEN WORK AND FAMILY?

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I. INTRODUCTION

Feminist theory began to be challenged in the late 1980s and early 1990s as being essentialist, "as presuming the universality of women and defining them according to a white middle-class heterosexual model."¹ These anti-essentialist critiques insisted on the need to speak from the experience of women of color, those of different classes and those of homosexual orientation. Yet, despite both the insistence on the need to include other voices and the growing development of Catholic feminist theologians,² there has been insufficient attention paid to the religious perspective by mainstream feminist legal thought.³ Thus, some of us now seek to add a Catholic religious perspective to the secular feminist dialogue about the law.⁴ Viewed in this light, Catholic feminist legal theory can be seen as the most recent articulation of an anti-essentialist feminist approach to the law.

1. FEMINIST LEGAL THEORY: AN ANTI-ESSENTIALIST READER 11 (Nancy E. Dowd & Michelle S. Jacobs eds., 2003) [hereinafter FEMINIST LEGAL THEORY].

2. See, e.g., WOMEN IN CHRIST: TOWARD A NEW FEMINISM (Michele M. Schumacher ed., 2004); SISTER PRUDENCE ALLEN, R.S.M., THE CONCEPT OF WOMAN: THE ARISTOTELIAN REVOLUTION 750 BC-AD 1250 (1997); SISTER PRUDENCE ALLEN, R.S.M., THE CONCEPT OF WOMAN: THE EARLY HUMANIST REFORMATION, 1250-1500 (2002). Rosemary Radford Ruether suggests that the critical principle of feminist theology is the promotion of the full humanity of women. Whatever denies, diminishes, or distorts the full humanity of women is, therefore, appraised as not redemptive . . . [W]hat does promote the full humanity of women is of the Holy, it does reflect true relation to the divine, it is the true nature of things, the authentic message of redemption and the mission of redemptive community.

ROSEMARY RADFORD RUETHER, SEXISM AND GOD-TALK: TOWARD A FEMINIST THEOLOGY 18-19 (1993).

3. It is interesting that the Dowd and Jacobs *Anti-Essentialist Reader* not only does not include any religious voice, but does not even acknowledge that there might be one. See Dowd & Jacobs, *supra* note 1. One commentator observed in 1989 that "[a]lthough it is now considered unacceptable (or "politically incorrect") to disregard feminist writing by women of color or lesbians, it is apparently still acceptable for feminists to disregard writing by religious feminists." Ruth Colker, *Feminism, Theology, and Abortion: Toward Love, Compassion and Wisdom*, 77 CAL. L. REV. 1011, 1015-16 (1989) (citing feminist Alison Jaggar's disregard of religious feminist writing in her survey of feminist theory on the grounds that she "finds them implausible" and "outside the mainstream of contemporary feminist theorizing"). The situation is not much different today, at least in the legal academy. That may be because some believe that Catholic feminism is an oxymoron, that there is a fundamental inconsistency between feminism and traditional religious thought. However, many schools of thought have developed within the feminist tradition and Catholic feminism deserves a place as one of them. That is, my conviction is that it is possible to have a more explicitly religious and Catholic normative structure and still recognize the fundamental equality and rights of women.

4. I speak of a "Catholic" Feminist Legal Theory because Catholicism is the tradition out of which I operate. I leave for a different day the question whether a *Catholic* Feminist Legal Theory would look (or feel) different from a *Christian* Feminist Legal Theory. It is worthwhile to explore whether there is a difference between Catholicism and non-Catholic Christianity that is relevant here. Would it be fair to suggest, for example, that if one speaks in terms of a Christian vs. a

Secular feminists and Catholic feminists share a concern about issues that affect women both generally and in their ability to participate fully in the workplace. They also share a concern about family, albeit not always in the same way. That is, while there are places secular and Catholic feminists can walk together in promoting a restructuring of the workplace to accommodate family, there are also areas in which they part company. This Article represents an effort to see where those points of convergence and divergence lie. It does so, first, by exploring the theoretical underpinnings of what may be called a Catholic feminist legal theory to see what such a theory adds to secular feminist legal theory. It then considers how that theoretical framework speaks to the relationship between work and family.

II. THE CONTRIBUTIONS OF A CATHOLIC FEMINIST LEGAL THEORY

A. *A Different Understanding of the Nature of the Human Person*

Catholic feminist legal theory proceeds from a different understanding of the nature of the human person than does secular theory. Underlying Catholic feminist legal theory is a human person that is relational by nature. Two aspects to this relationality exist, in that human beings are constitutively related both to God and to others. There are both “vertical and horizontal dimensions of the Church as communion,” the “vertical dimension referring to our intimate relationship with God as Trinity,” and flowing from that relationship “is the horizontal dimension which refers to our mutual relationship with one another in and through Christ.”⁵

With respect to our relationship to God, it is not only that we are relational, but also that we are loved and exist as persons capable of loving. We live in relation to, and in dependence on, a living God who is love and who loves each of us into being.⁶ And we exist endowed with the capacity to realize self “through a sincere gift of []self.”⁷

With respect to our constitutive relationship to others, the notion that human beings are relational by nature signifies “that [our] personal good—

Catholic feminist legal theory, that one is more wedded to a Biblical textual approach (at least to the extent that non-Catholic Christian means Protestant)? And even if there are no large doctrinal differences, is there an atmospheric or tonal difference? This Article does not seek to address such questions.

5. Anthony Cardinal Bevilacqua, *Pastoral Implications for the Study of Pastoral Theology Today*, in ANTHONY CARDINAL BEVILACQUA, LECTURESHIP IN PASTORAL THEOLOGY 17 (2003) (quoted in Susan J. Stabile, *Catholic Legal Theory*, 44 J. CATH. LEG. STUDIES 421, 424 n.13 (2005)). See PONTIFICAL COUNCIL FOR JUSTICE AND PEACE, COMPENDIUM OF THE SOCIAL DOCTRINE OF THE CHURCH ¶ 33 (2004) (describing call to interpersonal communion with God and each other) [hereinafter COMPENDIUM].

6. In the words of Pope John Paul II, “God is love and in Himself He lives a mystery of personal loving communion. Creating the human race in His own image and continually keeping it in being, God inscribed in the humanity of man and woman the vocation, and thus the capacity and responsibility, of love and communion.” Pope John Paul II, *Familiaris Consortio* ¶ 11 (1981).

7. Pope Paul VI, *Gaudium et Spes* (Pastoral Constitution of the Church in the Modern World) ¶ 24 (1965).

far from being opposed to the common good—is actually achieved through [our] participation in and contribution to this communal good.”⁸ Our self-realization is achieved in community.

It is important to recognize that Catholic thought views persons as relational *by nature*. I underscore this because it highlights a difference between Catholic feminist legal theory and dependency or care feminist legal theory.⁹ The latter appears to view women’s relationality either as a matter of choice or “as a critique of possessive individualism [more] than as a description of what men and women are actually like.”¹⁰ Even where the two arrive at the same place on some issues, it makes a difference that the feminism here proceeds from a Catholic view of the person rather than from a secular construct. Catholic faith supports and enriches certain feminist claims based on an understanding of relational autonomy rather than a more isolationist autonomy.¹¹

This relational understanding of the human person has many different implications. One important implication of relationality to others is that family (and marriage) and feminism are not mutually exclusive.¹² Additionally, feminism and sacrifice are not mutually exclusive.

A not insignificant strand of feminist thought is anti-family (at least traditional family) and anti-traditional forms of marriage. “Since the middle of the nineteenth century, but at a rapidly accelerating rate since the 1960s, feminism has been waging a relentless attack on all institutions, notably the family and the Church, that have curtailed women’s autonomy.”¹³

8. Michele M. Schunacher, *The Nature of Nature in Feminism, Old and New: From Dualism to Complementary Unity*, in *WOMEN IN CHRIST: TOWARD A NEW FEMINISM*, *supra* note 2, at 17, 20.

9. See, e.g., Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1 (1988) (focusing on connectedness of women); CAROL GILLIGAN, *IN A DIFFERENT VOICE* (1982) (describing women as nurturers who are more focused on relationships than are men). Joan Williams describes relational feminists as outlining “a new ethic of care based on a focus on relationship, not competition; on negotiation, not combat; on community, not individual self-interest.” Joan C. Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797, 811 (1989).

10. Williams, *supra* note 9, at 813. Even Martha Fineman, who speaks of dependency “as a universal and inevitable part of the human development,” views dependency as a temporal condition characteristic of children, the elderly, the ill and the disabled. Martha Albertson Fineman, *Cracking the Foundational Myths: Independence, Autonomy, and Self-Sufficiency*, 8 AM. U. J. GENDER SOC. POL’Y & L. 13, 18 (2000). Professor Kittay argues that this is not an accurate representation of how secular dependency theorists view relationality. See Eva Feder Kittay, *Speech, Searching for an Overlapping Consensus: A Secular Care Ethics Feminist Responds to Religious Feminists*, 4 U. ST. THOMAS L.J. 343, 468 (2007).

11. See Patricia Smith, *Autonomy, Aspirations, and Accomplishment: Some Steps and Barriers to Equality for Women*, in *FEMINIST LEGAL THEORY*, *supra* note 1, at 31. There is also clearly a second difference in that secular theory does not share a notion of relational existence to, and dependence on, God. Our relationship with God is central to Catholic feminist thought.

12. Because the family is so central to Catholic thought, it is taken up more directly and extensively in Section B, *infra*.

13. Elizabeth Fox-Genovese, *Feminism and the Unraveling of the Social Bond*, XIX No. 3 VOICES (2004), available at <http://wf-f.org/04-3-Feminism.html>. As the quote suggests, feminist thought has also often been anti-religious, although “[e]arly feminist hostility to tradition did not

This is a central dividing line for some. Part of the difficulty many religious women have with feminism is the tension “between feminism’s emphasis on women’s individual goals and the collective goals of family and community.”¹⁴ For many women, the fact that “feminism has, from the start cast the care for children as work fit only for servants, or at least as work that no woman should ever be compelled to shoulder,”¹⁵ is problematic.

Viewed from the other side,

[r]eligion is scorned in leftist secular circles for the way it is used by powerful elites to keep the oppressed classes in submission. Women and slaves and exploited workers can be pacified and persuaded to accept their lot because they are committed to Christian love, the necessity of suffering and general passivity.¹⁶

Some feminists insist that feminism requires absolute individual autonomy, including not only unlimited sexual freedom but also freedom from any special responsibility toward children.¹⁷ Catholic feminist legal theory offers an attempt to bridge the divide between the two sides.

More broadly, an understanding of the human person as inherently relational leads to both a different understanding of freedom and a different balance between community and autonomy. Secular theorists tend to think of freedom as autonomy and as promoting a desired individualism. The emphasis is on the primacy of autonomy, individual choice and self-determination.

[Secular] feminism rests upon the conviction that no one has the right to tell a woman what to do—to abridge her right to self-determination—or to compromise her absolute equality with men. All the variants on feminism are thus united by a fierce commitment to individualism and equality, and all fundamentally reject the notion of legitimate authority.¹⁸

always include open hostility to religion . . .” Elizabeth Fox-Genovese, *Why Must Religious Tradition be Reconciled with Feminism—Restorative, Radical, or Otherwise?*, 11 COMMON KNOWLEDGE 105, 107 (2005).

14. Elaine Howard Ecklund, *Catholic Women Negotiate Feminism: A Research Note*, 64 NO. 4 SOCIOLOGY OF RELIGION 515, 519 (2003). See Fox-Genovese, *Why Must Religious Tradition be Reconciled with Feminism*, *supra* note 13, at 109 (criticizing failure of feminism to “develop the tools to understand, much less appropriate tradition”).

15. Fox-Genovese, *Feminism and the Unraveling of the Social Bond*, *supra* note 13.

16. SIDNEY CALLAHAN, *WOMEN WHO HEAR VOICES: THE CHALLENGE OF RELIGIOUS EXPERIENCE* 27 (2003).

17. Elizabeth Fox-Genovese, *Catholic and Feminist: Can One Be Both?*, 2 NO. 4 LOGOS: A JOURNAL OF CATHOLIC THOUGHT AND CULTURE 11 (1999), available at <http://catholiceducation.org/articles/feminism/fe0025.html>.

18. Fox-Genovese, *Feminism and the Unraveling of the Social Bond*, *supra* note 13.

In stark contrast, Catholic theory understands freedom as the “free choice to become the kind of person God intends.”¹⁹ Freedom involves a choice in favor of truth, making freedom that which enables us to break out of the condition of alienation of self from others and from God.²⁰ Michele Schumacher suggests that “[t]he authentically liberated woman is, therefore, one who experiences herself as eternally loved and forgiven, and thus as authentically free.”²¹

The difference between secular and Catholic thought here reflects a very different view about external authority. Catholic thought proceeds from a belief that God “created the universe in accordance with a divine plan.”²² As Michael Himes eloquently discusses in his book, *Mysteries of Faith*,²³ when Catholics affirm our belief that God is the maker of heaven and earth, we affirm that there is one who made us and who gives our lives purpose and meaning. That is, someone other than ourselves assigns the end and goal of our existence. From the Catholic perspective, we live in a world that is not ours to do with what we please; we live in a universe not designed by us for our own goals and purposes. It is for us to choose whether to live in accordance with God’s plan, and thus to fulfill who we were intended by God to become.

The idea that the end or goal of our existence is determined by God and not ourselves is quite countercultural. Our society generally, and certainly feminist legal theory, celebrates the rights of individuals to make whatever choices they wish, accepting that anyone’s vision of the good is as

19. John L. Allen, Jr., *The Word from Rome: Benedict on the Family*, NATIONAL CATHOLIC REPORTER, June 10, 2005, available at <http://nationalcatholicreporter.org/word/word061005.htm#> (discussing Pope Benedict XVI’s rejection of “the voluntaristic understanding of freedom current in the West, i.e., that freedom means an absence of external constraints on behavior,” and acceptance of a “classic teleological view”).

20. See *Gaudium et Spes*, *supra* note 7, at ¶ 17 (contrasting freedom as “license for doing whatever pleases [one]” with authentic freedom); *Familiaris Consortio*, *supra* note 6, at ¶ 6 (speaking of the “corruption of the idea and the experience of freedom, conceived not as a capacity for realizing the truth of God’s plan for marriage and the family, but as an autonomous power of self-affirmation, often against others, for one’s own selfish well-being”).

21. Michele M. Schumacher, *An Introduction to a New Feminism*, in *WOMEN IN CHRIST: TOWARD A NEW FEMINISM* ix, xii (Michele M. Schumacher ed., 2004).

22. Teresa Stanton Collett, *Independence or Interdependence? A Christian Response to Liberal Feminists*, in *CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT* 178, 178 (Michael W. McConnell et al. eds., 2001); see Benedict XVI, *Message of His Holiness Pope Benedict XVI for the Celebration of the World Day of Peace* ¶ 3 (2007) (“[T]he norms of the natural law should not be viewed as externally imposed decrees, as restraints upon human freedom. Rather, they should be welcomed as a call to carry out faithfully the universal divine plan inscribed in the nature of human beings.”).

23. MICHAEL J. HIMES, *THE MYSTERY OF FAITH: AN INTRODUCTION TO CATHOLICISM* 55 (2004).

valid as any other.²⁴ Secular feminist theory, like liberal theory generally, believes we assign the purpose of our lives.

Thus, the reality that we exist in relation to God also invites us to reconsider secular feminism's rejection of any notion of external authority and to understand freedom in a way that does not require abandoning notions of responsibility toward others. Catholic feminist legal theory invites us to understand that, far from being limiting (as secular theorists view it), authority is freeing.

Seeing authority as freeing rather than limiting has enormous significance. Part of what makes the community-autonomy tension a genuine paradox, rather than merely an interesting dichotomy, is that there exists no clean practical line separating the two ideals; depending on one's life circumstances, every human is, to some degree, simultaneously an autonomous individual (or at least lives by the necessary fiction of being a coherent self, capable of meaningful agency) and a member of various communities (family, ethnic, religious, professional, etc.), such that it matters a great deal how we characterize the balance struck between the two ideals in a given situation, and, more important still, how we assess that particular choice of balance.²⁵

The understanding of relationality to God offers another important implication; that we are loved into creation by God carries with it a notion of gift—of seeing all as gift from a loving God. “[T]o affirm that God is Creator does not mean merely expressing a theoretical conviction, but also grasping the original extent of the Lord’s gratuitous and merciful action on behalf of [humans]. In fact, God freely confers being and life on everything that exists.”²⁶

Seeing everything as gift has a tremendous impact on our notions of rights and entitlements and of our obligations toward each other. If one sees all we have as the product of our own deserts and merits—as coming solely from ourselves—then we walk with a sense of entitlement. With that mindset, giving up any of what we are entitled to becomes an unacceptable sacrifice. If all is gift, we walk with an attitude of gratitude. With that mindset, it becomes much easier to give of ourselves, and sacrifice becomes a very different concept.

24. See Collett, *supra* note 22, at 178 (citing language from *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992) that “the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life” is at the “heart of liberty”).

25. Gregory C. Pingree, *Rhetorical Holy War: Polygamy, Homosexuality, and the Paradox of Community and Autonomy*, 14 AM. U. J. GENDER SOC. POL’Y & L. 313, 316 (2006). Pingree observes that “[c]ontemporary cultural debates about the relative virtues of autonomy and community are, essentially, variations on the fundamental question that motivated Socrates, Plato and Aristotle: what makes a good society?” *Id.* at 360.

26. COMPENDIUM, *supra* note 5, at ¶ 26.

B. A Different Approach to Family

In Section A, I opined that a relational understanding of the human person implies that family (and marriage) and feminism are not mutually exclusive. Because the family has such a central place in Catholic thought and because family is so central to the focus of this Symposium, Section B explores more fully the role of family in Catholic thought.

In Catholic thought, the institution of the family is indispensable to the promotion of the common good, that is, to promoting the conditions necessary for the flourishing of the human person.²⁷ In the family we get our first revelation of our interconnectedness as humans. "It is in the context of family that people learn that they are not born as isolated, autonomous monads, but rather as a precious part of a social unit."²⁸ We are born into relationship, bound to each other in covenant, not in contract.²⁹

That covenant, however, is not merely one that exists among family members. Family is not simply a special relationship; rather, it is the blueprint for our relation to the broader human community. That is, it is through the "complex of interpersonal relationships" set up in matrimony and in the family that "each human person is introduced into the 'human family' and into the 'family of God,' which is the Church."³⁰ The family is a reflection of God's love and the love of Christ for the Church.³¹ Thus, it is "the primary place of 'humanization' for the person and society."³²

27. Christopher P. Vogt, *The Family as Cornerstone of the Good Life and the Good Society: Family Life in the Compendium of the Social Doctrine of the Church*, 27 REV. OF BUS. 13, 13 (2006) (observing that the family is "an institution that is indispensable for society's effort to foster the social conditions necessary for all persons to flourish"). *Gaudium et Spes* defines the common good as "the sum of those conditions of social life which allow social groups and their individual members relatively thorough and ready access to their own fulfillment." *Gaudium et Spes*, *supra* note 7, at ¶ 26.

28. Vogt, *supra* note 27, at 14. Thus, what we are really saying here is not that the family is something non-family is not, but, rather, that the family is the model for ideal human relation.

29. See Vogt, *supra* note 27, at 14–15 (discussing contract vs. covenant model and the idea that "each and every person is always born into a network of relationships with duties and obligations").

30. *Familiaris Consortio*, *supra* note 6, at ¶ 15. As one commentator observed, "the family is a key venue in which human beings come to know the deepest truth about themselves." Vogt, *supra* note 27, at 13.

31. *Familiaris Consortio*, *supra* note 6, at ¶ 17. See Pope Benedict XVI, *Deus Caritas Est* ¶ 11 (Dec. 25, 2005) (discussing marital love as illustration of God's love for the world), available at http://www.vatican.va/holy_father/benedict_xvi/encyclicals/documents/hf_ben-xvi_enc_20051225_deus-caritas-est_en.html. One is reminded in this context of Jesus' response to his disciples when told that his mother and brothers were outside waiting to talk to him. Jesus said, "Who is my mother and who are my brothers?" and elaborated that whoever does God's will is his mother, brother and sister. *Matthew* 12:48-50; *Mark* 3:32-35; *Luke* 8:20-2 (The New American Bible).

32. Pope John Paul II, *Christifidelis Laici* ¶ 40 (1988). This understanding finds its scriptural roots in the Book of Genesis, both in the intended communion of males and females and in their participation in the creative work of God. See *COMPENDIUM*, *supra* note 5, at ¶ 209 (discussing Genesis 1:26-28, 2:7-24).

This dynamic allows family to serve as an important counter to the individualism that is increasingly prevalent in the United States. It places at the forefront obligations that do not depend on contract. It also makes a place for sacrifice—for giving up some goods to achieve a higher good. Marriage and family themselves require sacrifice as part of the orientation toward the greater communal good and remind us that the well-being of our entire community may require some sacrifice of unlimited personal freedom as well.³³

Catholic thought has definite views, not only of the role of family, but also on what “family” means. From the Catholic perspective, “indissoluble monogamous marriage [is] the only authentic form of the family,”³⁴ a statement that carries within it several different essential attributes of marriage, and therefore family. First is the importance of a monogamous marriage—one in which the parties give themselves to each other “with a love that is total and therefore unique and exclusive.”³⁵ Second is that marriage is necessarily characterized by indissolubility and fidelity, the absence of which “compromises the relationship of exclusive and total love that is proper to the marriage bond, bringing great pain to the children and damaging repercussions also on the fabric of society.”³⁶ Third is that the family is “born of the intimate communion of life and love founded on the marriage between one man and one woman.”³⁷ Authentic family possesses the complementarity of mother and father.

For these reasons, the Church sees as a blight and a shadow on family: divorce, polygamy and homosexual unions.³⁸ All of these are threats to “the community of marriage and the family.”³⁹

In this respect, there is a great divergence between Catholic thought and secular feminist thought. Martha Fineman, for example, arguing in

33. See Vogt, *supra* note 27, at 15 (observing that “[t]he willingness of Jesus to sacrifice everything—even his own life—out of love for the church is the model of married love” and discussing sacrifice within the family).

34. COMPENDIUM, *supra* note 5, at ¶ 229. See Congregation for the Doctrine of the Faith, *Letter to the Bishops of the Catholic Church on the Collaboration of Men and Women in the Church and in the World* ¶ 2 (2004) (speaking of the “natural two-parent structure of mother and father”).

35. *Familiaris Consortio*, *supra* note 6, at ¶ 19. See also *Gaudium et Spes*, *supra* note 7, at ¶ 49 (speaking of the equal dignity of husband and wife “acknowledged by mutual and total love” and leading to the “unity of marriage”).

36. COMPENDIUM, *supra* note 5, at ¶ 225.

37. *Id.* at ¶ 211. See Collett, *supra* note 22, at 186 (discussing Genesis 2:22-23 as an explanation of “the divine plan that men and women attain their mutual fulfillment in communion with one another”); *Concept of Marriage is Eroding, Warns Pope*, ZENIT NEWS, Jan. 29, 2007 (citing address of Pope Benedict XVI discussing the “truth of marriage” as including an “indissoluble conjugal bond” between husband and wife).

38. See Pope John Paul II, *Familiaris Consortio*, *supra* note 6, at ¶ 19 (stating that marriage, the mutual gift of man and woman, is characterized by unity and indissolubility).

39. *Id.* at ¶ 18.

favor of a collective societal responsibility for dependency,⁴⁰ takes pains to point out that an “important concern is to ensure that any theory of collective responsibility not concede the right of collective control over individual intimate decisions, such as . . . how to form one’s family.”⁴¹ Implicit is a rejection of traditional notions of marriage and family in place of the idea that each person should be free to define family, with the law refraining from favoring any one form over another.

Fineman’s position raises a question at the theoretical level of how there can be a collective responsibility toward something as to which we have no common definition; presumably the collective responsibility has to be toward something—something as to which we have a shared value.⁴² That question aside, there is no doubt that it is a claim fundamentally at odds with a Catholic view of the family.

C. *A Different Understanding of Sex and Gender*

Catholic feminist legal theory and secular feminist legal theory diverge significantly with respect to their perspectives on sex and gender. Much secular feminist discussion views sex as constructed and views differences between men and women as socially constructed. Many secular theorists claim that biological principles are not determinative and that we should speak in terms of gender and gender roles rather than in terms of biological sex.⁴³ Moreover, they view choices women make or preferences they ex-

40. Fineman, *supra* note 10. She argues for such a collective or societal responsibility based on the fact that “dependency is a universal and inevitable part of the human development,” in the sense that we were all “dependent as children, and many of us will be dependent as we age, become ill, or suffer disabilities,” and that “dependency needs must be met if a society is to survive . . .” *Id.* at 18.

41. *Id.* at 16. See also MARTHA ALBERTSON FINEMAN, *THE AUTONOMY MYTH: A THEORY OF DEPENDENCY* xix (2004) (arguing that the state should not promote any one form of family over others); Eva Feder Kittay, *A Feminist Public Ethic of Care Meets the New Communitarian Family Policy*, 111 *ETHICS* 523, 525–26 (2001) (suggesting that the traditional form of family has been oppressive to women and “must give feminists pause”). In a conversation on the Mirror of Justice blog subsequent to the Symposium for which this Article was written, Professor Kittay expressed her concern “that limiting family to the heterosexual two-parent monogamous family will stand in the way of achieving the sort of well-being for ourselves and our neighbors that [secular and Catholic feminists] may both wish to see.” See Mirror of Justice, *Kittay’s Response to Michael S.* (March 21, 2007), http://www.mirrorofjustice.com/mirrorofjustice/2007/03/kittays_respons.html. See also Jamie Alan Aycock, *Contracting Out of the Culture Wars: How the Law Should Enforce and Communities of Faith Should Encourage More Enduring Marriage Commitments*, 30 *HARV. J.L. & PUB. POL’Y* 231, 232 (2006) (arguing that the law should permit individuals to further their own visions of the family, without imposing a single vision of family on society as a whole).

42. See *infra* notes 168–174 and accompanying text for a discussion of the Catholic feminist vs. secular feminist grounding for societal support of care work.

43. Hanna-Barbara Gerl-Falkovitz, *Gender Difference: Critical Questions Concerning Gender Studies*, *WOMEN IN CHRIST: TOWARD A NEW FEMINISM* 3, 10–11 (Michele M. Schumacher ed., 2004). As an example of such thinking, in November 2006, New York City proposed allowing people to change their sex on their birth certificate, even without first having sex-change surgery, making sex a matter of preference rather than biology. See Damien Cave, *New York Plans To Make Gender Personal Choice*, *N.Y. TIMES*, Nov. 7, 2006, at A1. The proposal was

hibit that seem to reflect gender differences⁴⁴ as themselves the product of “deep-seated social differences [that] continue to encourage men and women to make quite different choices with respect to work and family.”⁴⁵

Catholic feminist legal theory, in contrast, proceeds from an understanding that there are differences between male and female that are not simply a product of social convention and patriarchal influences and that are not merely biological.⁴⁶ Although women and men are both created in the image of God and therefore enjoy a natural equality,⁴⁷ there are essential ways in which women differ from men; an understanding that carries with it a different sense of the balance between nature and nurture than does secular feminist thought. Catholic feminist thought thus embraces both the idea that men and women are equal and that they are different.⁴⁸

withdrawn amid criticism. See Damien Cave, *No Change in Definition of Gender*, N.Y. TIMES, Dec. 6, 2006, at B1. This view has been taken by others as well. For example, a 2007 UNICEF report on the empowerment of women takes the position that, although men and women are different biologically, gender roles are merely cultural constructions, and are learned rather than inborn. See UNICEF, *The State of the World's Children 2007: Women and Children: The Double Dividend of Gender and Equality* 1 (2007), <http://www.unicef.org/sowc07/docs/sowc07.pdf>.

44. For examples, some studies report that significant numbers of women would prefer to stay at home after having children if they could afford to do so. See John Flynn, *Women, Work and the Family: Searching for Equilibrium in a High-Pressure World*, ZENIT NEWS REPORT, Mar. 5, 2007, <http://zenit.org/article-19073?l=english>.

45. Williams, *supra* note 9, at 799.

46. Pope John Paul II, *Letter of Pope John Paul II to Women* ¶ 7 (1995), available at http://www.vatican.va/holy_father/john_paul_ii/letters/documents/hf_jp-ii LET_29061995_women_en.html (explaining that difference between womanhood and manhood is not only physical and psychological, but also ontological).

47. Pope Benedict XVI, *The Human Person, The Heart of Peace*, Message of His Holiness Pope Benedict XVI for the Celebration of the World Day of Peace ¶ 6–7 (Jan. 1, 2007), available at http://www.vatican.va/holy_father/benedict_xvi/messages/peace/documents/hf_ben-xvi_mes_20061208_xl-world-day-peace_en.html (speaking of the “essential equality of human persons springing from their common transcendental dignity” and suggesting there can be “no illusion of a secure peace” until discrimination and subordination of women is overcome, since they “injure the personal dignity impressed by the Creator upon every human being”); Congregation for the Doctrine of the Faith, *Letter to the Bishops of the Catholic Church on the Collaboration of Men and Women in the Church and in the World* ¶ 8 (2004), available at http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20040731_collaboration_en.html (men and women are equally persons because each is created in the image of God, but “[t]heir equal dignity as persons is realized as physical, psychological and ontological complementarity, giving rise to a harmonious relationship of ‘uni-duality’”); Pope John Paul II, *Mulieris Dignitatem* ¶ 10 (1988), available at http://www.vatican.va/holy_father/john_paul_ii/apost_letters/documents/hf_jp-ii_apl_15081988_mulieris-dignitatem_en.html (identifying the first woman as an “I” and emphasizing the essential equality of men and women).

48. Pope John Paul II, *Mulieris Dignitatem*, *supra* note 47, at ¶ 10 (“The personal resources of femininity are certainly no less than the resources of masculinity: they are merely different.”). See Prudence Allen, *Man-Woman Complementarity: The Catholic Inspiration*, 9:3 LOGOS: A JOURNAL OF CATHOLIC THOUGHT AND CULTURE 87, 97–99 (2006) (tracing the evolution of Pope John Paul II’s thought on the equality and complementarity of men and women). The early church spoke in terms of *koinonia* or *communio*, the notion that “all are equally the object of God’s free and spontaneous gift of mercy in Jesus Christ.” FRANCIS MARTIN, *THE FEMINIST QUESTION: FEMINIST THEOLOGY IN THE LIGHT OF CHRISTIAN TRADITION* 43 (1994). Some feminists will never take seriously the Church’s claimed belief in the equality of women because of what they view as

Part of this difference is the Catholic understanding of femininity as part of the personal identity of women. Pope John Paul II elucidates this point in his *Catechesis on the Book of Genesis*.⁴⁹ "Man and woman constitute two different ways of the human 'being in a body' in the unity of that image."⁵⁰ Likewise, "sex is a constituent part of the person."⁵¹ From the perspective of Catholic thought, sexual differences are not merely physical differences, but characterize men and women on the psychological and spiritual levels as well.⁵² This is captured in the notion of complementarity, the idea that "[w]oman complements man, just as man complements woman."⁵³

This complementarity means that men and women contribute differently to the life of the world. *Gaudium et Spes* speaks of men and women developing their gifts in accordance with their identity.⁵⁴ Pope John Paul II spoke of the "genius of women,"⁵⁵ of the fact that "women occupy a place in thought and action, which is unique and decisive."⁵⁶

Although John Paul II did not provide a full elucidation of what he meant by the "genius of women," he spoke of various aspects of this genius.⁵⁷ In *Evangelium Vitae*, he wrote that

"Church practices that originated in the tradition of women's inferiority, including the Church's traditional male-only priesthood doctrine." Terrance R. Kelly, *Canaanites, Catholics and the Constitution Developing Church Doctrine, Secular Law and Women Priests*, 7 RUTGERS J.L. & RELIG. 3, Introduction (2005).

49. Pope John Paul II, *Catechesis on the Book of Genesis: Creation as a Fundamental and Original Gift* (Jan. 2, 1980), available at http://www.vatican.va/holy_father/john_paul_ii/audiences/catechesis_genesis/documents/hf_jp-ii_aud_19800102_en.html.

50. *Id.*

51. Jennifer Ferrara & Sarah Hinlicky Wilson, *Ordaining Women: Two Views*, Vol. 2003 16.3 FIRST THINGS: A JOURNAL OF RELIGION, CULTURE, AND PUBLIC LIFE 33, 34 (discussing John Paul II's understanding of the male and female in his *Catechesis on the Book of Genesis*).

52. See Joseph Ratzinger, *Letter to the Bishops of the Catholic Church on the Collaboration of Men and Women in the Church and in the World* ¶ 8 (May 31, 2004), available at http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20040731_collaboration_en.html.

53. In the words of the late Pope John Paul II, "woman complements man, just as man complements woman: men and women are *complementary*. Womanhood expresses the 'human' as much as manhood does, but in a different and complementary way." Pope John Paul II, *Letter of Pope John Paul II to Women*, *supra* note 46, at ¶ 7. That womanhood and manhood express two different ways of being human has meaning "not only from the physical and psychological points of view, but also from the ontological." *Id.*

54. Pope Paul VI, *Gaudium et Spes*, *supra* note 7, at ¶ 25.

55. Pope John Paul II, *Mulieris Dignitatem*, *supra* note 47, at ¶ 30.

56. Pope John Paul II, *Evangelium Vitae* ¶ 99 (Mar. 25, 1995), available at http://www.vatican.va/holy_father/john_paul_ii/encyclicals/documents/hf_jp-ii_enc_25031995_evangelium-vitae_en.html. See Pope Paul VI, *Second Vatican Council II Closing Speeches and Messages: To Women* (1965), available at <http://www.papalencyclicals.net/Paul06/p6closin.htm> ("But the hour is coming, in fact has come, when the vocation of women is being acknowledged in its fullness, the hour in which woman acquires in the world an influence, an effect and a power never hitherto achieved.").

57. His failure to more explicitly define the genius of women appears to have been intentional. Mary Ann Glendon, in discussing various writings of John Paul II's on women, suggests that

women first learn and then teach others that human relations are authentic if they are open to accepting the other person, a person who is recognized and loved because of the dignity which comes from being a person, and not from other considerations, such as usefulness, strength, intelligence, beauty, or health.⁵⁸

He explicitly ties that with a notion that women are meant to transform the culture.⁵⁹ In his 1995 *Letter to Women*, he spoke of women's "affective, cultural and spiritual motherhood," and of their contribution to progress measured according to the "social and ethical dimension, which deals with human relations and spiritual values," a measure of progress he viewed as far more important than the traditional criteria of measuring human progress.⁶⁰ In *Mulieris Dignitatem*, he spoke of "a special sensitivity" that is characteristic of women's femininity, and of the way in which women model a response of faith to God, characterized by their receptivity and fidelity.⁶¹

Similar themes were taken up by then-Cardinal Joseph Ratzinger in his 2004 *Letter on the Collaboration of Men and Women*.⁶² He spoke of women's "capacity for the other," which expresses a similarity with the Triune God, and of their "singular capacity to persevere in adversity, to keep life going even in extreme situations, to hold tenaciously to the future, and finally to remember with tears the value of every human life."⁶³ For those reasons, he wrote that women have an "irreplaceable role in all aspects of family and social life involving human relationships," both in the home and in the workplace.⁶⁴ In his first encyclical, *Deus Caritas Est*, Pope Benedict XVI talked about the "incompleteness" of man without woman.⁶⁵ More re-

[t]he tone of all these writings is dialogical. Their author invites women to reflect and meditate with him about the quest for equality, freedom, and dignity in light of the faith and in the context of a changing society where the Church and the faithful are faced with new and complex challenges.

Mary Ann Glendon, *The Pope's New Feminism*, CRISIS, 28 (Mar. 1997), available at <http://www.catholiceducation.org/articles/feminism/fe0004.html>.

58. Pope John Paul II, *Evangelium Vitae*, *supra* note 56, at ¶ 99.

59. *Id.* at ¶ 99. Some secular feminists share this view of women as capable of, and charged with, transforming the world, although they may have a more limited idea of what that transformation means. "Relational feminists' interest in 'the feminine' stems from its transformative potential. Relational feminists find enshrined in domesticity 'female' values that, they believe, will enable women to achieve equality not by buying into the male world on male terms, but by transforming the world in women's image." Williams, *supra* note 9, at 810.

60. Pope John Paul II, *Letter of Pope John Paul II to Women*, *supra* note 46, at ¶ 9.

61. Pope John Paul II, *Mulieris Dignitatem*, *supra* note 47, at ¶ 15-16.

62. Joseph Ratzinger, *Letter to Bishops of the Catholic Church on the Collaboration of Men and Women in the Church and in the World*, *supra* note 52.

63. *Id.* at ¶ 6, 13.

64. *Id.* Regarding the latter, although Ratzinger spoke of the importance of motherhood, he at the same time was critical of "attempt[s] to enclose women in mere biological destiny." *Id.* See *infra* notes 132-133 and accompanying text.

65. *Deus Caritas Est*, *supra* note 31, at ¶ 11. Nonetheless, there has been at least some criticism of Benedict for not discussing the contributions of women during the portion of the encyclical in which he discusses the early history of the Church. See Susan A. Ross, *Eros and*

cently, the current Pope gave thanks for all women “for all the manifestations of the feminine ‘genius,’”⁶⁶ pointing out that “without the generous contribution of many women, the history of Christianity would have developed very differently.”⁶⁷

The Catholic view⁶⁸ translates into a different way of thinking about gender classifications. Although John Paul II is clear on matters such as women receiving equal pay for equal work,⁶⁹ Christian feminist legal theory would find that gender classifications are not always invalid and that absolute equality is not the aim.⁷⁰ It would reject certain feminist efforts to “dis-institutionalize gender.”⁷¹ Instead, it invites us to explore what it means to offer women equal respect and equal opportunity to men.

Secular feminists would argue that equality means women have to be given exactly the same opportunities as men; radical feminists speak in terms of absolute equality between men and women in all aspects of life. For example, one feminist has argued that the world to which feminists are or should be committed is one in which “half of senators, governors, legislators, and political leaders were women, as well as half the business leaders, scientists, scholars, writers, doctors, lawyers . . . and other professional persons.”⁷² Catholic feminists mean something different (and I think something both more subtle and richer); they think in terms of giving women equal opportunity to become fully human, which may very well (indeed,

Agape: Some Feminist Reflections, AMERICA, 11, 12 (Mar. 13, 2006). That is an omission he rectified in an address given on February 14, as the following two notes discuss.

66. Pope Benedict XVI, *General Audience* (Feb. 14, 2007) (reproduced in ZENIT NEWS REPORT, Feb. 14, 2007), available at <http://zenit.org/article-18918?l=english>.

67. *Id.* The Pope spoke of women being among Christ’s disciples and playing an active role in his ministry, singling out not only Mary for her special role, but also Mary Magdalene as the first witness to the Resurrection and, in the words of Thomas Aquinas, “the apostle of the apostles.”

68. Not all of those who can be characterized as Catholic feminists agree with the views expressed by John Paul II and Cardinal Ratzinger in the documents cited in the text. Sidney Callahan, for example, rejects the notion of a particular “genius of women,” and the claim that gender determines the “role or kind of gifts that Christians are called to exercise.” Sidney Callahan, *Ratzinger, Feminist? Not Quite*, COMMONWEALTH, Sept. 10, 2004, at 9.

69. Pope John Paul II, *Letter of Pope John Paul II to Women*, *supra* note 46, at ¶ 4.

70. This somewhat overstates it in that most feminists would agree that some classifications are valid. But clearly, the Catholic legal theory would accept as valid some gender classifications that would not be accepted by secular feminist legal thinkers.

71. See, e.g., Williams, *supra* note 9, at 802. See also David B. Cruz, *Disestablishing Sex and Gender*, 90 CAL. L. REV. 997, 1004–05 (2002) (arguing in favor of the “deinstitutionalization of gender beliefs including correlations between bodily sex and gender stereotypes or expectations” and suggesting that the “government cannot support or reinforce gender beliefs or gender divisions”).

72. Smith, *supra* note 11, at 26. Smith rejects the view that because of intrinsic differences, men and women have different abilities, aspirations or interests. Among other things, she says that “in the absence of any proven facts . . . to make presumptions without proof” is problematic. *Id.* at 27.

likely does) mean something different for women than for men.⁷³ From a Catholic perspective, equality must go “hand in hand with . . . the recognition of both the difference and complementarity between men and women.”⁷⁴

This also means that Catholic feminist theory would take a different position on the ways feminism tries to remove women from what it views as gender constructions. For some secular feminists, lesbianism, transvestism and sex change “are now not only conceivable but desirable.”⁷⁵ Others have expressed the need for feminists “to disrupt the perceived naturalness of the links between women, caretaking, and motherhood, and to promote alternative life paths for women.”⁷⁶ Under such ways of thinking, anything that helps break down stereotypical gender roles becomes positive in and of itself. Catholic feminists would look very differently at such choices.⁷⁷

D. *Vocation and a Theology of Work*

Both our existence in relation to God and others and the belief that there are real differences between men and women have implications in terms of vocation. The use of the term “vocation” rather than “work” highlights the importance of understanding the Church’s theology of human work.

As expressed in *Laborem Exercens*, a central theme in Catholic thought is work as participation in the creative action of God—in the work of creation itself, and therefore as means of sanctification.⁷⁸ In the words of Pope John Paul II, “man, created in the image of God, shares by his work in the activity of the Creator and . . . continues to develop that activity, and

73. See, e.g., Pope John Paul II, *Letter of Pope John Paul II to Women*, *supra* note 46, at ¶ 8 (“[W]oman and man are marked neither by a static and undifferentiated equality nor by an irreconcilable and inexorably conflictual difference.”). Thus, John Paul II calls upon women to promote a “new feminism,” one which does not simply imitate male models. Pope John Paul II, *Evangelium Vitae*, *supra* note 56, at ¶ 99. Similarly, what may be a virtue for men may be different from what is a virtue for women. As one example, it may be more important for men to develop the virtue of humility, whereas in women, the more virtuous characteristic, given women’s history, may be self-assertion.

74. *Holy See: Sexes are Different but Equal*, ZENIT NEWS, Mar. 8, 2007, <http://www.zenit.org/article-19104?l=english> (also noting that the struggle for equality “would not be authentic” if it endangers or contradicts the recognition of difference and complementarity).

75. Gerl-Falkovitz, *supra* note 43, at 11.

76. Maxine Eichner, *Dependency and the Liberal Polity: On Martha Fineman’s The Autonomy Myth*, 93 CAL. L. REV. 1285, 1297–98 (2005) (discussing “anti-repronormativity model” advanced by Mary Anne Case and Katherine Franke, which “reconceptualize[s] procreation as a cultural preference rather than a biological imperative”).

77. In the 2004 *Letter to the Bishops of the Catholic Church on the Collaboration of Men and Women in the Church and in the World*, then-Cardinal Ratzinger criticized ideologies seeking “liberation from biological determinism” that call into question the traditional family and promote homosexuality as the equivalent of heterosexuality. Ratzinger, *supra* note 53, at ¶ 2.

78. Pope John Paul II, *Laborem Exercens* ¶ 25 (1981). *Laborem Exercens* states that the work is “at the very centre of the ‘social question’” and refers to it as a condition of cultural and moral development as well as economic development. *Id.* at ¶ 2.

perfects it as he advances further and further in the discovery of the resources and values contained in the whole of creation."⁷⁹

Thus, this sense of work as participation in the act of creation, as a means for realizing our full potential as humans, comes from our creation in the image of God and the dignity of the human person; the purpose of work is to create and the purpose of creation is to fulfill our calling to be in the image of God. While we need to work in order to live and in order to pay for the things we need to live, that is not the purpose of work.

Man, then, does not work because he does not have the wealth stored up to constantly be at rest; man works because his dignity is in creating . . . [M]an was created not simply for wages, but he was created to work. It is in work that man's divine nature is displayed.⁸⁰

Work thus serves (or should serve) to facilitate and encourage the human person in becoming "more of a human" and therefore receptive to the divine.⁸¹ Work, therefore, is for the human person, rather than the human person being for work.⁸²

Our human vocation, then, comes from the God who gives our lives their purpose and meaning. The human vocation to participate in the work of creation can take various forms. St. Paul speaks in a broader context of one body of many parts,⁸³ with each of us having a particular part in the co-creation of the world with God. All work, from a Catholic perspective "can provide fulfillment and contribute to personal, familial and human good."⁸⁴

For the most part the secular world thinks of work in more narrow terms. Work is viewed as separate from our spiritual life (whatever form that spirituality takes). In contemporary times, the holiness of work is often overlooked, displaced by a purely economic view of work. Even "many men and women of genuine spirituality . . . view their work as something disconnected from their spiritual concerns," seeing work simply as a way to

79. *Id.* at ¶ 25. The Compendium of the Social Doctrine of the Church speaks of work as participation both in creation and in redemption. COMPENDIUM, *supra* note 5, at ¶ 263.

80. Randy Lee, *Dorothy Day and Innovative Social Justice: A View from Inside the Box*, 12 WM. & MARY J. WOMEN & L. 187, 201 (2005). As Professor Lee observes, this reality has profound implications for all individuals. "When we recognize that work is best viewed as the act of creation, we are left to ask of our own work not merely, 'What do I do?' but 'What have I created?'" *Id.* at 202.

81. Patricia A. Lamoureux, *Commentary on Laborem Exercens (On Human Work)*, in MODERN CATHOLIC SOCIAL TEACHING: COMMENTARIES AND INTERPRETATIONS 389, 404 (Kenneth R. Himes et al. eds., 2004) (through work the human person both "transforms nature" and "achieves fulfillment and becomes even more human").

82. *Laborem Exercens*, *supra* note 78, at ¶ 6. The Compendium of the Social Doctrine of the Church emphasizes that, although work is essential, "the ultimate and definitive meaning of life is not to be found in work. Work is essential, but it is God— and not work— who is the origin of life and the final goal of man." COMPENDIUM, *supra* note 5, at ¶ 257.

83. 1 *Corinthians* 12:12.

84. Lamoureux, *supra* note 81, at 404.

make a living.⁸⁵ To think of work as purely a means to an economic end is obviously very different from a view of work as part of our human vocation.⁸⁶

As the discussion in the previous section suggests, Catholic feminist legal theory translates into a notion that women have a vocation that is different from men. Among other things, it accepts that human beings are entrusted to women in a special way, seeing the significant value of a woman's maternal and family role (accepting, for example, that a woman's relationship to children is qualitatively different from and complementary to a father's relationship), while accepting that the role may be accomplished in a variety of ways. This does not mean that Catholic thought does not believe men play a crucial role in family life; it means simply that the role is different.

III. CATHOLIC FEMINISTS, SECULAR FEMINISTS AND EFFORTS TO RESTRUCTURE THE WORKPLACE TO ACCOMMODATE FAMILY LIFE

Despite the fact that women have made great strides in the workplace,⁸⁷ women who are mothers face inequality both in the workplace and within the home. At work, they continue to earn less than their male counterparts and to receive less interesting work.⁸⁸ At home, they continue to

85. Anthony T. Kronman, *Pepperdine Commencement Speech*, 32 PEPP. L. REV. 439, 439 (2005). This appears to be as true for many Christians as it is for non-Christians. See, e.g., *Wanted: A Theology of Work*, INITIATIVES (Nat'l Center for the Laity, Chicago, Ill.), May 2007, at 1 (observing that "too many Christians regard their time on the job as tangential to the claims of their faith").

86. Apart from the question of work-family balance, the difference between a Catholic and a secular theory of work has other implications for how we think of obligations in the workplace. Our views of the acceptability of certain levels of unemployment and issues of how we design and structure the workplace are examples that come immediately to mind.

87. See, e.g., Rachel Arnow-Richman, *Accommodation Subverted: The Future of Work/Family Initiatives in a "Me, Inc." World*, 12 TEX. J. WOMEN & L. 345, 346 (2003) ("statistics show significant improvement in women's participation in market work and their compensation relative to men"); Samuel Issacharoff & Elyse Rosenblum, *Women and the Workplace: Accommodating the Demands of Pregnancy*, 94 COLUM. L. REV. 2154, 2160 (1994) (noting "dramatic increases" in participation rates of female work force); Luciana Real, *Women in Catholic Social Thought: The Creation of a New Social Reality*, 44 J. CATH. LEGAL STUD. 461, 462 (2005) (commenting on the "remarkable increase in opportunities for women and official recognition of their equality with men" during the past century); *When Work Works: New Ideas from the Winners of the Alfred P. Sloan Awards for Business Excellence in Workplace Flexibility*, WHEN WORK WORKS (Families & Work Inst., New York, N.Y.), 2006, at ii (noting that nearly half of the wage and salaried workforce is now women).

88. See, e.g., ANN CRITTENDEN, *THE PRICE OF MOTHERHOOD: WHY THE MOST IMPORTANT JOB IN THE WORLD IS STILL THE LEAST VALUED* 93 (2001) (citing wage gap between men and women who are mothers); Laura T. Kessler, *The Attachment Gap: Employment Discrimination Law, Women's Cultural Caregiving, and the Limits of Economic and Liberal Legal Theory*, 34 U. MICH. J.L. REFORM 371, 385-87 (2001) (stating that women are more likely than men to end up in lower paying "mommy-track" professional positions and noncommissioned retail work, and that these part time or contingent jobs often pay less, are less stable, and less frequently offer "health

bear most of the childcare and housework responsibilities.⁸⁹ Women are also often forced into making unsatisfactory choices, and end up feeling like they are not doing a good job either at work or at home as they try to juggle the responsibilities of both.⁹⁰ Moreover, while working men with families may make fewer sacrifices than women, it would be a mistake to ignore the fact that men, too, suffer from a failure of the workplace to sufficiently accommodate family needs, which makes it difficult for them to more actively participate in the lives of their families.⁹¹

How does Catholic feminist legal theory contribute to our thoughts about the current structure of the workplace and how to change that structure to better accommodate family life? In this section, I explore how the theoretical underpinnings of Catholic feminist legal theory discussed in Section I help us to think about the workplace. Subsection A takes issue with an emphasis on equality as a basis for seeking changes in the work-

insurance, childcare benefits, pension benefits, or opportunities for advancement"); Meredith Render, *The Man, the State and You: The Role of the State in Regulating Gender Hierarchies*, 14 AM. U. J. GENDER SOC. POL'Y & L. 73, 77 (2006) (noting that despite the fact that women and men have worked in "legally-mandated gender-integrated workplaces" for 30 years, "women collectively inhabit a markedly subordinate sphere in the workforce"); Christine L. Williams, *The Unintended Consequences of Feminist Legal Reform: Commentary on The Sanitized Workplace*, 29 T. JEFFERSON L. REV. 101, 102-03 (2006) (reporting study findings that most women "continue to work in predominantly female jobs" and that women have, in fact, not "successfully integrated previously male-only careers"). The disparity exists at the executive level as well. See Alison Maitland, *Business Life: Women Still Struggling to the Summit of Workplace Equality*, FIN. TIMES, NOV. 10, 2006, at 12 (reporting on study finding that only 3.8 percent of executive directors on boards are women, almost half of the Fortune 1000 companies have no women among their top executives and forecasting that a decade from now "women will account for just 6.2 percent of chief executives of the largest companies in the U.S., which usually leads the world in business trends"). The same situation exists outside of the United States, for example in the United Kingdom. See THE EQUALITIES REVIEW, FAIRNESS AND FREEDOM: THE FINAL REPORT OF THE EQUALITIES REVIEW 43 (2007) (observing that although women comprise an increasing percentage of the workforce, women and some ethnic minorities "are still more likely to be concentrated in fewer sectors, in junior positions, and in low-paid jobs"). The report of the Equalities Review finds that the "employment penalty" of mothers is greater than that of partnered women with no children and that of single women. *Id.* at 63.

89. See Kessler, *supra* note 88, at 379-80 (noting that women spend "considerably" more time than men on housework and caregiving, and although the overall time spent by women on such tasks has declined since the 1970s, this is because of "an overall decline in the hours of housework performed by women, as opposed to an increase in such work performed by men"); Naomi R. Cahn, *The Coin of the Realm: Poverty and the Commodification of Gendered Labor*, 5 J. GENDER RACE & JUST. 1, 5 (2001) (citing statistics that upon marriage or cohabitation, the average woman adds 4.2 hours to the time she spends on household work, while the average man subtracts 3.6 hours); Tina Beattie, *Feminism, Vatican-Style*, THE TABLET, Aug. 7, 2004. (despite the fact that "women are working longer hours outside the home, they still do most of the housework and childcare as well"). See also Mary Becker, *Care and Feminists*, 17 WIS. WOMEN'S L.J. 57, 93 (2002) (observing that "[t]here is no known society in all of human history in which carework went from being women's work to equally divided between the sexes").

90. See Beattie, *supra* note 89.

91. See, e.g., Nancy E. Dowd, *Bringing the Margin to the Center: Comprehensive Strategies for Work/Family Policies*, 73 U. CIN. L. REV. 433, 443 (2004) (finding that economic and cultural barriers stand in the way of fathers' increased involvement in family life).

place. Subsections B and C address the two basic approaches to work-family that have emerged in secular feminist discussion: the “accommodation approach” that seeks workplace reforms that better accommodate family life and the “compensation” approach that seeks to place value on caring for the family. As my earlier discussion in Section I highlights, there are important roles for women in the market workplace as well as in the home; the centrality of the place of women in family does not lessen the value of their participation in the workplace. As my discussion of the following issues indicates, there are some places where I believe Catholic feminist legal theory would reach the same conclusions and prescriptions as those espoused by secular feminists; in others the paths of the two theories diverge.

A. *The Secular Feminist Traditional Focus on Equality*

Historically, much of the focus of secular feminists in seeking changes in the workplace has been on promoting equality between men and women.⁹² Many of the things secular feminists demand as a function of equality are things Catholic feminists would have no difficulty supporting, such as equal pay for women.⁹³

Equality of women is not an unimportant concern and it may not be an exaggeration to suggest that “the achievement of equality for women [i]s an essential step in eliminating poverty and fostering development . . . and to eradicating all forms of prejudice and injustice.”⁹⁴ However, notwithstanding Catholicism’s belief in the fundamental equality of men and women,⁹⁵ from the Catholic standpoint, a primary focus on equality can on the one hand be too limiting and on the other can lead to positions Catholic Feminist Theory would not support. Let me give an example of each.

1. *Equality as Limitation: Pregnancy Benefits*

The legal treatment of pregnancy in the United States offers a good example of the limitations of a focus on equality. In the early part of the twentieth century, not only did the law do nothing to protect the jobs of pregnant women or provide any pregnancy-related benefits, but the law ac-

92. This was the focus of the first wave of legal feminism, the liberal feminist tradition. *See, e.g.,* Mary Becker, *Patriarchy and Inequality: Towards a Substantive Feminism*, 1999 U. CHI. LEGAL F. 21, 32–33 (1999) (describing focus of liberal feminist theory).

93. *See, e.g.,* *Letter of Pope John Paul II to Women* ¶ 4 (noting the need for “equal pay for equal work” and “fairness in career advancements”). Under Catholic Social Thought, “[w]omen have a right to productive work, decent and fair wages, union membership, private property, and other economic benefits.” Reali, *supra* note 87, at 474.

94. Gila Stopler, *Countenancing the Oppression of Women: How Liberals Tolerate Religious and Cultural Practices That Discriminate Against Women*, 12 COLUM. J. GENDER & L. 154, 166–67 (2003).

95. *See supra* note 47.

tually "‘protected’ pregnant women right out of their jobs."⁹⁶ That is, many states passed laws requiring women to leave their jobs when they became pregnant or after giving birth.⁹⁷

The enactment of Title VII of the Civil Rights Act of 1964⁹⁸ set the stage for the treatment of pregnancy benefits and protection of the jobs of pregnant women under the rubric of nondiscrimination and equality. Title VII itself prevents discrimination on the basis of sex in compensation or in the terms, conditions, or privileges of employment.⁹⁹ It does not address pregnancy and maternity and, for many years the statute was viewed as offering no protection for women dismissed from their jobs due to pregnancy and as offering no basis to argue that an employer must provide his pregnant employees with job-protected maternity leave.¹⁰⁰ Indeed, in 1976, the Supreme Court explicitly held in *General Electric Co. v. Gilbert*¹⁰¹ that discrimination on the basis of pregnancy did not constitute discrimination on the basis of sex in violation of Title VII.¹⁰²

96. Wendy W. Williams, *Equality's Riddle: Pregnancy and Equal Treatment/Special Treatment Debate*, 13 N.Y.U. REV. L. & SOC. CHANGE 325, 334 (1984–85). See Deborah A. Calloway, *Accommodating Pregnancy in the Workplace*, 25 STETSON L. REV. 1, 22 (1995) ("The history of gender discrimination in the United States is littered with cases of 'protective' legislation and policies that, in reality, served primarily to limit the rights and opportunities of women.").

97. Paolo Wright-Carozza, *Organic Goods: Legal Understandings of Work, Parenthood, and Gender Equality in Comparative Perspective*, 81 CAL. L. REV. 531, 554 (1993). See Williams, *supra* note 96, at 334, n. 35 (citing several examples of such statutes, among them CONN. GEN. STAT. ANN. 7 § 31-26 (West 1960); MASS. ANN. LAWS ch. 149, § 55 (Michie/Law. Co-op. 1958) (repealed 1974). See also N.Y. LAB. LAW § 206-b (McKinney 1965) (prohibiting employment of females after they have given birth). Wendy Williams observes that such laws reflected the normative judgment that "when wage-earning women became pregnant they did, and should, go home." Williams, *supra* note 96, at 335.

98. 42 U.S.C. §§ 2000e-17 (2000).

99. 42 U.S.C. § 2000e-2 (1978) provides that

[i]t shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

100. Until 1972, the EEOC's position was that maternity was a temporary disability to be anticipated for most female employees, and that it would not be discriminatory for an insurance plan to exclude maternity from covered risks. See Wright-Carozza, *supra* note 97, at 556 (citing Opinion Letters from the General Counsel of the EEOC). In 1972, the EEOC reversed its position and issued guidelines that required employers to treat pregnancy as they would other temporary disabilities. 29 C.F.R. § 1604.10(b) (1975). See Sally J. Kenney, *Pregnancy Discrimination: Toward Substantive Equality*, 10 WIS. WOMEN'S L.J. 351, 360. The Supreme Court disagreed. See *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125 (1976).

101. *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125 (1976).

102. "[W]e have here no question of excluding a disease or disability comparable in all other respects to covered diseases or disabilities and yet confined to the members of one race or sex. Pregnancy is, of course, confined to women, but it is in other ways significantly different from the typical covered disease or disability. The District Court found that it is not a 'disease' at all, and is often a voluntarily undertaken and desired condition. We do not therefore infer that the exclusion

Continued lobbying for equal treatment¹⁰³ resulted in passage by Congress in 1978 of the Pregnancy Discrimination Act (the "PDA"),¹⁰⁴ which amended Title VII to specifically provide that discrimination on the basis of sex includes discrimination "because of or on the basis of pregnancy, childbirth, or related medical conditions."¹⁰⁵ To underscore the definitional change, the PDA provides that "women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work."¹⁰⁶

Although there are many who could defend the claim that "the equal treatment approach to pregnancy 'is the one best able to reduce structural barriers to full workforce participation of women, produce just results for

of pregnancy disability benefits from petitioner's plan is a simple pretext for discriminating against women" (citation omitted). *Gilbert*, 429 U.S. at 136. The Court emphasized, "[I]t is impossible to find any gender-based discriminatory effect in this scheme simply because women disabled as a result of pregnancy do not receive benefits; that is to say, gender-based discrimination does not result simply because an employer's disability-benefits plan is less than all-inclusive." *Id.* at 138-39. The Supreme Court had previously ruled that discrimination on the basis of pregnancy was not an equal protection violation. *See Geduldig v. Aiello*, 417 U.S. 484 (1974) (exclusion of pregnancy and pregnancy-related disabilities from state disability insurance program was not an unconstitutional sex-based classification). The Supreme Court had, however, ruled that state laws requiring that pregnant women take leave was a violation of the Due Process Clause of the Fourteenth Amendment. *See Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632 (1974).

103. *See Kenney*, *supra* note 100, at 361-62

(*Gilbert* . . . galvanized the feminist movement and Congress reacted swiftly. . . . Those feminists who litigated the important constitutional and statutory cases in the 1970s and early 1980s and lobbied for passage of the Pregnancy Discrimination Act argue for an expansive comparative approach. They claim that employers should treat pregnancy as any other condition which requires people to miss work.).

104. 42 U.S.C. § 2000e(k) (1978).

105. *Id.*

106. *Id.* The PDA is not the only potential source of protection for pregnant women. The Americans with Disabilities Act of 1993 provides that no employer "shall discriminate against a qualified individual with a disability because of the disability of such individual." 42 U.S.C.S. § 12112(a) (LexisNexis 2007). Discrimination includes

not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an . . . employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity.

Id. at § 12112(b)(5)(A). This has lead some to argue that a pregnant woman is entitled to the ADA reasonable accommodations. *See Calloway*, *supra* note 96, at 27. EEOC regulations exclude pregnancy from ADA coverage. 29 C.F.R. §§ 1630.2(h), 1630.2(j) (2007). The EEOC's official webpage offers a fact sheet for quick reference in the form of question and answer that specifically states that pregnancy is not an ADA disability. *The Family and Medical Leave Act, The Americans with Disabilities Act, and Title VII of the Civil Rights Act of 1964*, <http://www.eeoc.gov/policy/docs/fmlaada.html> (last visited Feb. 8, 2007). However, the U.S. Supreme Court has stated that reproduction is a "major life activity" under the Act. *Bragdon v. Abbott*, 524 U.S. 624, 638 (1998). This has caused some lower courts to find that although pregnancy itself is not covered, pregnancy-related disabilities do fall under the scope of the ADA. *See, e.g., Gabriel v. City of Chicago*, 9 F. Supp. 2d 974 (N.D. Ill. 1998).

individuals, and support a more egalitarian social structure,'"¹⁰⁷ the limits of the PDA attributable to the focus on equality are obvious. Despite ensuring that pregnant women are not discriminated against merely on the basis of their pregnancy and that pregnancy-related conditions that affect a woman's ability to work are treated the same as other disabilities that prevent employees from working, the statute merely prevents discrimination. It stops an employer from firing a woman merely because of her pregnancy, thereby providing a level of job security, but does not affirmatively require that employers provide leave for pregnancy or maternity per se. An employer who offers no other disability coverage need not provide any leave associated with "pregnancy-related disabilities." And, while the effect of an employer providing some coverage for other disabilities is to require coverage for "pregnancy-related disabilities," the length of any such coverage is a function of disability, rather than a function of the needs of the mother and child, which go beyond a medical definition of disability. As one commentator observed, "by virtue of its limited goal of eliminating discrimination in the workplace, Title VII cannot ground any larger normative vision for the role of parenting."¹⁰⁸

Part of the tension for secular feminists is the fear that arguing for pregnancy benefits on some basis other than equality—arguing for anything more than treating women equally as men—would serve to reinforce "traditional, male-dominated family models."¹⁰⁹ As a result of that fear, any support for parenting or family by secular feminists only indirectly arises where that support advances a claim of women's equality.¹¹⁰

107. Wright-Carozza, *supra* note 97, at 561 (quoting Williams, *supra* note 96, at 351–52).

108. Maxine Eichner, *Square Peg in a Round Hole: Parenting Policies and Liberal Theory*, 59 OHIO ST. L.J. 133, 139 (1998). Eichner observes that the PDA "considers only the employment interests of the pregnant employee by focusing on her ability or inability to work. It does not consider the broader range of goods realized through parenting for the employee, children, and communities." *Id.* at 140–41. See also Laura T. Kessler, *Keeping Discrimination Theory Front and Center in the Discourse Over Work and Family Conflict*, 34 PEPP. L. REV. 313, 324 (2007) (observing that "courts deciding Title VII cases have generally refused to interpret the law to cover employee's caregiving responsibilities beyond the immediate, physical events of pregnancy and childbirth"). Even in securing its own goal, the PDA is limited. The number of pregnancy discrimination charges filed with the EEOC has increased thirty-five percent in recent years, at the same time that the birth rate in the United States has declined by nine percent. Hanah Cho, *Bias Complaints Are Up; Some Fear Career Impact*, BALTIMORE SUN, Mar. 28, 2007 (noting record number of pregnancy discrimination complaints filed with EEOC and state agencies in 2006; a 23 percent increase since 1997, "making it one of the fastest-growing workplace bias complaints"); Alison A. Reuter, *Subtle But Pervasive: Discrimination Against Mothers and Pregnant Women in the Workplace*, 33 FORDHAM URB. L.J. 1369, 1372 (2006). The same can be said for Title VII generally; "a voluminous body of social science research demonstrates that unlawful gender discrimination persists inside the workplace." Kessler, *supra*, at 317.

109. Wright-Carozza, *supra* note 97, at 561.

110. See Eichner, *supra* note 108, at 133 ("Feminist theory, while rightly arguing that parenting supports are needed for women to achieve equality, has generally failed to support parenting for the other goods realized through it, as well.").

While Catholic feminist legal theorists share a concern for equal treatment of women, the Catholic concern is much broader than merely protecting women against discrimination. Concern with the dignity of the human person means a focus on the well-being of both the fetus and the prospective mother pre-delivery, as well as on the parent-child relationship and the needs of both infant and mother post-delivery. And the centrality of the family to the common good, discussed earlier, means that Catholic feminist legal theory approaches the question of pregnancy and maternity leave from the perspective of what best fosters the well-being of the family. It therefore provides a stronger theoretical basis from which to argue for greater pregnancy and maternity benefits than does the secular focus on equality.¹¹¹

2. *Equality as Justification for Positions Antithetical to Catholic Thought: Mandatory Contraception Coverage*

It is clear that Catholic feminist legal theory would not support some of the claims made by secular feminists based on equality between men and women.¹¹² One example of where the two paths diverge is with respect to proposals to force employers—including religious employers—to provide prescription contraception coverage to their employees.

Although prescription contraceptives have been available for years, until recently many employer-sponsored health plans did not provide coverage for them.¹¹³ This lack of coverage began to receive significant attention

111. To a not insignificant extent, the Family and Medical Leave Act (the "FMLA") shifts the focus away from equality in providing for unpaid leave in connection with childbirth. As discussed in Section B, however, the FMLA is too limited.

112. Perhaps the greatest divide is on the issue of abortion. From the secular feminist side, there has been a movement from privacy to equality as the basis for the claim to abortion rights. Abortion has come to be seen as a matter of individual rights and of women's ability to participate equally in society. Taken to its furthest limit, this results "in the claim that a woman's freedom from oppression depends on her right to have an abortion at any stage in a pregnancy." Fox-Genovese, *supra* note 13. Fox-Genovese argues,

Casey made explicit the social and economic assumptions that underlie the case for abortion on demand: since women had become accustomed to the free disposition of their sexuality and labor, an unplanned pregnancy should not be allowed to interfere with their ability to support themselves—or force a man or the government to do so for them. . . . For feminists the right to abortion is necessary to the defense of women's sexual liberation. For elite men and women, it is too often the defense of their freedom from economic responsibility for those less fortunate than they.

Id. So central is this claim, that many secular feminists would argue that, by definition, pro-life is anti-feminist. See, e.g., Susan Frelich Appleton, *Unraveling the "Seamless Garment": Loose Threads in Pro-life Progressivism*, 2 U. ST. THOMAS L.J. 294 (2005). Catholic feminist legal theory would clearly reject both the claim that equality for women requires free access to abortion and that, even if it did, it would justify promotion of abortion. Given the present focus on workplace issues, however, the abortion controversy is beyond the scope of this Article.

113. "[H]alf of all traditional indemnity plans in 1993 did not cover any reversible prescription methods of contraception, and only 15% covered all of the five leading methods" Cynthia Dailard, *The Cost of Contraceptive Insurance Coverage*, GUTTMACHER REP. ON PUB. POL'Y, March 2003, at 12 (citing 2001 Kaiser Family Foundation findings that only forty-one percent of insured employees had coverage of all reversible contraceptives, while "virtually all . . .

in 1996, when, following the FDA's approval of Viagra, most insurance plans moved to cover it.¹¹⁴ The coverage of Viagra and not prescription contraceptives led to secular feminist demands for "contraceptive equity,"¹¹⁵ resulting in the passage of contraceptive-equity laws in at least twenty states over the last eight years.¹¹⁶ Although most of the state statutes provide an exclusion for churches and other religious organizations, some provide either no exclusion or define the exclusion so narrowly that many church organizations do not fall within the exclusion.¹¹⁷

The position of the Catholic Church on contraception is unambiguous. The Catechism of the Catholic Church labels as "intrinsically evil" any "action which, whether in anticipation of the conjugal act, or in its accom-

employees" had coverage of prescription drugs in general), available at <http://www.guttmacher.org/pubs/tgr/06/1/gr060112.pdf>.

114. U.S. FOOD & DRUG ADMIN., *First Oral Therapy for Erectile Dysfunction*, 28 FDA MEDICAL BULLETIN (1998), available at <http://www.fda.gov/medbull/summer98/erectile.html>; Laurie McGinley, *Medicaid Programs Are Told to Pay for Viagra but Monitoring Continues*, WALL ST. J., July 2, 1998, at B5; Geraldine Sealey, *Who Pays for the Pill? Women See Progress in Getting Birth Control Covered by Health Insurance*, ABC NEWS, June 19, 2002, <http://www.freerepublic.com/focus/news/702692/posts>. Interestingly, given that widespread coverage of Viagra galvanized the fight for contraceptive coverage, more recent statistics show that more companies provide their employees with coverage for contraception than for erectile dysfunction medication. A national survey of two hundred fifty benefits managers conducted by Greenberg Quinlan Rosner Research, Inc. in the spring of 2004 found that eighty-nine percent of companies cover contraceptives and only forty-five percent cover erectile dysfunction medication. GREENBERG QUINLAN ROSNER RESEARCH INC. ET AL., *FEMALE REPRODUCTIVE HEALTH COVERAGE* (2004), <http://www.arhp.org/files/061504execsumm.pdf>.

115. See Carey Goldberg, *Insurance for Viagra Spurs Coverage for Birth Control*, N.Y. TIMES, June 30, 1999, at A1 (discussing link between coverage of Viagra and fight for contraception coverage); *Insurers Criticized for Covering Viagra and Not the Pill*, BOSTON GLOBE, May 13, 1998, at A8; *Insurers Urged to Cover Contraceptives*, PORTLAND PRESS HERALD, May 13, 1998, at 6C. Secular feminists take the position that access to contraception is necessary for women's equality. See Appleton, *supra* note 112, at 298 (suggesting that confidence in the ability to control reproduction is "an important element of a full, free, and equal life" for women).

116. Dailard, *supra* note 113. The demand for change also included a number of lawsuits that successfully alleged the failure to cover prescription contraception was a violation of Title VII. See *Cooley v. DaimlerChrysler Corp.*, 281 F. Supp. 2d 979 (E.D. Mo. 2003) (denying an employer's motion to dismiss a sex discrimination claim based on exclusion of contraceptive coverage from health plan); *Erickson v. Bartell Drug Co.*, 141 F. Supp. 2d 1266 (W.D. Wash. 2001) (holding an employer's failure to provide insurance coverage for prescription contraceptives to be a violation of Title VII); *Equal Employment Opportunity Comm'n v. United Parcel Service, Inc.*, 141 F. Supp. 2d 1216 (D. Minn. 2001) (denying an employer's motion to dismiss sex discrimination claim based on exclusion of coverage for oral contraceptives from health plan); *Wessling v. AMN Healthcare*, No. 01-CV-0757 W (S.D. Cal. Aug. 8, 2001) (denying employers' motion to dismiss sex discrimination claim based on exclusion of coverage for prescription contraceptives from health plan); *Decision on Coverage of Contraception*, U.S. Equal Employment Opportunity Comm'n, (Dec. 14, 2000), <http://www.eeoc.gov/policy/docs/decision-contraception.html> (ruling an employer violated Title VII by excluding prescription contraceptives from employee health insurance plan).

117. See Susan J. Stabile, *State Attempts to Define Religion: The Ramifications of Applying Mandatory Prescription Contraceptive Coverage Statutes to Religious Employers*, 28 HARV. J.L. & PUB. POL'Y 741, 748 (2005). In that Article, I examine the claims of secular feminists that the failure of plans to provide for contraception coverage constitutes discrimination against women. See *id.* at 767-770.

plishment, or in the development of its natural consequences, proposes, whether as an end or as a means, to render procreation impossible.’”¹¹⁸ From Pope Pius XI’s 1930 encyclical *Casti Connubii*,¹¹⁹ through John Paul II’s 1995 encyclical *Evangelium Vitae*,¹²⁰ Popes have continuously reiterated the Church’s moral objection to the use of artificial means of birth control.

Catholic feminist theologians have not been uniform in their support of the Church’s position on contraception,¹²¹ with some suggesting that contraception is necessary for women to have equality.¹²² However, Catholic feminists would share with other Catholic thinkers a concern with placing legal mandates on religious employers to provide contraception coverage to their employees. As I have argued in more detail elsewhere,¹²³ subjecting religious-affiliated entities to the reach of mandatory contraception coverage statutes does not give sufficient respect to the Catholic faith and provides impetus for more serious incursions into religious entities’ practice of their religion. Among other incursions along this potentially very slippery slope, it is clear that secular proponents of such statutes view them as the step toward, for example, requiring Catholic employers to provide coverage for abortions and requiring Catholic hospitals to provide abortions,¹²⁴ both of which are clearly troubling from a Catholic feminist perspective.

Mandatory contraception coverage is thus an example of where Catholic feminist legal theory would draw a different conclusion from certain facts than would secular theory. Even if it were the case that motherhood

118. CATECHISM OF THE CATHOLIC CHURCH No. 2370 (1st ed., U.S. Catholic Conf. 1994) (quoting Pope Paul VI, *Humanae Vitae*, No. 14 (July 25, 1968), available at http://www.vatican.va/holy_father/paul_vi/encyclicals/documents/hf_pvi_enc_25071968_humanae-vitae_en.html). I discuss the development of the Church’s position on birth control in more detail in Stabile, *supra* note 117, at 749–51.

119. Pope Pius XI, *Casti Connubii*, (Dec. 31, 1930), available at http://www.vatican.va/holy_father/pius_xi/encyclicals/documents/hf_p-xi_enc_31121930_casti-connubii_en.html. In *Casti Connubii*, Pope Pius XI reaffirmed earlier Church statements that the use of means to deprive the sexual act of its power to procreate life “is an offense against the law of God and of nature, and those who indulge in such are branded with the guilt of a grave sin.” *Id.* at No. 56.

120. Pope John Paul II, *Evangelium Vitae*, *supra* note 56, at No. 13; see also Pope Paul VI, *Humanae Vitae*, No. 17 (July 25, 1968), available at http://www.vatican.va/holy_father/paul_vi/encyclicals/documents/hf_pvi_enc_25071968_humanae-vitae_en.html (“[T]here are certain limits, beyond which it is wrong to go . . . because of the reverence due to the whole human organism and its natural functions.”).

121. Compare LISA SOWLE CAHILL, *SEX, GENDER, AND CHRISTIAN ETHICS*, 205 (1996) (“It seems not unreasonable to suppose . . . that fear of women’s social equality with men and a tenacious grip on subordinating practices lie not far below the surface readings of women’s ‘dignity’ which equate it with maternity and limit reliable control of pregnancy.”), with Sr. Prudence Allen, *Philosophy of Relation in John Paul II’s New Feminism*, in *WOMEN IN CHRIST: TOWARD A NEW FEMINISM*, *supra* note 2, at 97–98 (suggesting that artificial birth control, “as a form of domination or control of woman’s or man’s body, is not good because it inevitably leads to contraventions of the personalistic norm”).

122. See Cahill, *supra* note 121.

123. See Stabile, *supra* note 117.

124. See *id.* at 765–66.

(rather than gender) was the larger barrier to women's participation in the public sphere,¹²⁵ Catholic feminist legal theory would not be persuaded to support requiring religious employers to provide contraception coverage.

B. Workplace Accommodation of Family Responsibilities of Men and Women

There is no question that women (and men) who give priority to their family life are disadvantaged in the workplace because they do not fit the model of an ideal worker. In simplest terms, "most mainstream work fails to take into account institutions of intimacy, such as the family."¹²⁶ Joan Williams identifies as a defining characteristic of the current workforce an accepted view of the ideal worker as one willing to give his all to his job, without any competing demands on his time.¹²⁷

There is also little question that women are disadvantaged by the ideal worker model to a greater extent than are men¹²⁸ because of their "disproportionate responsibility for work related to childrearing, housekeeping, and other nonmarket work . . ."¹²⁹ This contributes to the reality of women still being paid less than men and having less access to the best and most inter-

125. Elizabeth Rose Schiltz, *Should Bearing the Child Mean Bearing All the Cost? A Catholic Perspective on the Sacrifice of Motherhood and the Common Good*, LOGOS: J. CATH. THOUGHT & CULTURE (forthcoming) (discussing impact of motherhood on advancement of women in the workplace), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=814104.

126. Fineman, *supra* note 10, at 13. Fineman criticizes that "workplaces operate in modes incompatible with the idea that workers also have obligations for dependency." *Id.* at 21.

127. JOAN WILLIAMS, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT 1 (2000) (describing as one characteristic of the "domesticity" that she claims remains the entrenched American norm, the "organization of market work around the ideal of a worker who works full time and overtime and takes little or no time off for childbearing or child rearing"); see also Daniel J.H. Greenwood, *Gendered Workers/Market Equality*, 12 TEX. J. WOMEN & L. 323, 334 (2003) (describing "market norm" as denying family obligations and encouraging workers to "attempt to win a competitive advantage in this new arena by limiting those responsibilities—unencumbering themselves and selling their labor at prices reflecting only their individual needs").

128. See Williams, *supra* note 9, at 801 (arguing that work and family responsibilities "are at the core of the contemporary gender system, which systematically enriches men at the expense of women and children"); Reuter, *supra* note 108, at 1370 (observing that "the male-centric job model continue[s] to constrain women").

129. Michael Selmi, Commentary, *Care, Work, and the Road to Equality: A Commentary on Fineman and Williams*, 76 CHI.-KENT L. REV. 1557, 1557 (2001) (observing that women's disproportionate responsibility in those areas "substantially impacts women's paid work in various and complicated ways"). Williams notes that the ideal worker norm excludes most women of childbearing age. Williams, *supra* note 127, at 2 ("A rarely recognized but extraordinarily important fact is that jobs requiring extensive overtime exclude virtually all mothers.") (emphasis omitted); see also Katharine K. Baker, *Supporting Children, Balancing Lives*, 34 PEPP. L. REV. 359, 370 (2007) (finding that most married women, whether employed or not outside of the home, "do vastly more housework than their husbands"); Kessler, *supra* note 108, at 324 (noting that "courts have refused to interpret discrimination on the basis of sex 'plus' an employee's need to adjust her work schedule to care for a child as unlawful sex discrimination . . ."). Courts have not allowed Title VII challenges to various workplace practices that "negatively affect women workers, including long work hours, rigid work schedules, limited personal leave, strict limits on absentee-

esting jobs.¹³⁰ For a woman to succeed in the marketplace, she must conform to the model of an ideal worker and subordinate home life and family to her job.¹³¹

Catholic feminist legal theory shares with secular feminists a concern that the workplace fails to acknowledge the family responsibilities of workers. It does so out of a two-fold concern that I believe is a richer and fuller viewpoint than the secular one. The first is the conviction of Catholic thought that women have something unique to contribute to the workplace. It is not only that "equal dignity and responsibility . . . fully justif[y] women's access to public functions,"¹³² but also the conviction that women can make an indispensable contribution to the world order, making their active and full presence in the working world valuable.¹³³ The second is the importance of promoting the well-being of the family, which, as I discussed earlier, is so central to Catholic thought.

The focus of much secular feminist theory appears to be narrower. That is, the focus of secular theory appears, more often than not, to be on the individual fulfillment and well-being of the employee parent (be it mother or father). To be sure, in contrast to the equality focus, here there appears to be a concern for employees who are fathers as well as employees who are mothers, consistent with the Catholic notion that both women and men have important roles in the upbringing of children. But the secular focus appears to be primarily on meeting the needs of the employee and on the employee's self-actualization, whereas the Catholic focus is not only the well-being of the woman, but also that of the larger family unit and, indeed, of the world as a whole, which needs the presence of women in all venues.

In addition to a broader focus regarding goals, Catholic theory here also contributes a richer basis for arguing that the workplace has an affirmative obligation to support families. First, as I have discussed elsewhere in

ism, prolonged probation or evaluation periods, frequent or extended travel requirements, and the second-class treatment of part-time workers." *Id.*

130. See *supra* note 88 and accompanying text.

131. Dan Greenwood has suggested that the perverse "confluence of women's entry into the workplace with the death of social democracy resulted in recreating the American worker as a gendered, unencumbered bachelor. Women have been freed to be men, and men have been freed to be single." Greenwood, *supra* note 127, at 323.

132. Pope John Paul II, *Familiaris Consortio*, *supra* note 6, at No. 23; see Pope John Paul II, *Women: Teachers of Peace*, No. 9 (Jan. 1, 1995) (calling women's increased presence in "social, economic and political life at the local, national and international levels" a positive development, and noting that women "have a full right to become actively involved in all areas of public life, and this right must be affirmed and guaranteed, also, where necessary, through appropriate legislation"), available at <http://www.ewtn.org/library/PAPALDOC/JP2WOMPC.htm>.

133. See *supra* notes 55-67 and accompanying text. In his *Letter to Women*, Pope John Paul thanks "women who work" for their "indispensable contribution to the growth of a culture which unites reason and feeling, to a model of life ever open to the sense of 'mystery', to the establishment of economic and political structures ever more worthy of humanity." Pope John Paul II, *Letter of Pope John Paul II to Women*, *supra* note 46, at No. 2 (emphasis omitted).

my writings, a central theme of Catholic thought is the common good.¹³⁴ Because of the primacy of promoting the common good, Catholic thought demands that it must be the aim of *every human institution* to promote human dignity, to promote the fundamental rights of persons to life, bodily integrity, and “the means that are suitable for the proper development of life.”¹³⁵ This includes the workplace; in the words of the *Compendium*, “businesses should be characterized by their capacity to serve the common good of society”¹³⁶ Indeed, it is especially true of the workplace given the view of work as our participation in the work of creation and therefore what facilitates our growth as humans.¹³⁷ Second, Catholic thought understands work and family to be “so deeply intertwined that the vitality of each cannot be considered separately.”¹³⁸ Because of the effect each has on the other, the workplace must be concerned with the health of its workers’ family lives.

In my view, none of the foregoing differences between Catholic feminist legal theory and secular feminist theory create any tension in terms of proposals to make the workplace more accommodating of the family responsibilities of men and women; what Catholic feminist legal theory adds is a different layer and type of support for such proposals.

Thus, Catholic feminists and secular feminists can stand together in supporting, for example, the protection afforded to working parents by the Family and Medical Leave Act (the “FMLA”),¹³⁹ which provides job-protected (albeit unpaid) leave for a working parent who has a defined family need.¹⁴⁰ They can similarly both support employer arrangements for flex-time and telecommuting, and the provision of generous absenteeism and

134. The *Compendium of the Social Doctrine of the Church* identifies the common good as one of the principles that “constitute[s] the very heart of Catholic social teaching.” *COMPENDIUM*, *supra* note 5, at No. 160 (emphasis omitted).

135. Pope John XXIII, *Pacem in Terris*, Nos. 131–35 (Apr. 11, 1963), available at http://www.vatican.va/holy_father/john_xxiii/encyclicals/documents/hf_jxxiii_enc_11041963_pacem_en.html; Pope Leo XIII, *Rerum Novarum*, No. 28 (May 15, 1891), available at http://www.vatican.va/holy_father/leo_xiii/encyclicals/documents/hf_lxiii_enc_15051891_rerum-novarum_en.html; Pope Paul VI, *Gaudium et Spes*, *supra* note 7, Nos. 181–82; Pope John Paul II, *Christifidelis Laici*, *supra* note 32, Nos. 14–15.

136. *COMPENDIUM*, *supra* note 5, at No. 338.

137. See *supra* text accompanying notes 78–84.

138. Vogt, *supra* note 27, at 16; see *COMPENDIUM*, *supra* note 5, at No. 294.

139. 29 U.S.C. § 2601 (1993).

140. Under the FMLA, an employee can take up to twelve weeks of unpaid leave each year to provide care for a newborn child, a newly adopted child, a spouse, parent, son, or daughter with a serious health condition, or the employee himself or herself if he or she has a serious health condition. 29 U.S.C. § 2612(a). On return from the leave, the employee is entitled to her former position or a position with equivalent pay and benefits. § 2614(a)(1)(A)–(B). The employee cannot lose accrued benefits because of the leave. § 2614(a)(2). Health benefits must continue while the employee is on leave. § 2614(c)(1). The FMLA only applies to employees who have been working for the employer for at least twelve months and worked at least 1,250 hours in the last year. § 2611(2). For the Act to apply to an employer, it must have at least 50 employees. § 2611(4).

sick leave policies, all of which, like the FMLA, "claim[] for all workers . . . the time and flexibility they need for family care."¹⁴¹

Some secular theorists have argued for even greater workplace changes to address the hardship on workers wishing to give some priority to their family lives. Michael Selmi, for example, has proposed amendments in leave law designed to encourage men to take more parental leave.¹⁴² Concerned that "men have not yet changed their employment-related behavior, and [that] employers exact penalties on women not only because of their actual behavior, which differs from men's, but also because of the presumption that women will leave the workforce when they have children,"¹⁴³ Selmi proposes that employers be required to provide paid leave to their employees with the further requirement that employers ensure that at least half of eligible male and female employees utilize the leave as a condition to the employer's eligibility for federal contracts of a certain size.¹⁴⁴ Among other things, it is his hope that as more men are encouraged to take leave, the issue would come to be viewed as one that affects all employees, rather than just women, resulting in family leave being incorporated into standard benefit packages.¹⁴⁵ As with the earlier examples, I see no tension here between Catholic feminist legal theory and the idea that the law should encourage leave by men as well as by women, although the Catholic motivation would be less Selmi's instrumental concern than the idea that promoting a father's involvement in family is a positive to family well-being.

Joan Williams argues for restructuring the workplace to replace the existing norm of the ideal worker as a man without substantial family responsibilities with a norm that recognizes that employees have family relationships and responsibilities, and that therefore does not penalize workers

141. Joan Williams, Afterword, *Exploring the Economic Meanings of Gender*, 49 AM. U. L. REV. 987, 1001 (2000). The U.S. Department of Labor reports that in 2004, 27.5 percent of all full-time and salary workers had flexible work schedules that allowed them to vary start or end time of daily work. U.S. DEP'T OF LABOR, WORKERS ON FLEXIBLE AND SHIFT SCHEDULES IN MAY 2004 (July 1, 2005), <http://www.bls.gov/news.release/flex.nr0.htm>. Men were slightly more likely to have flexible schedules: 28.1 percent of men versus 26.7 percent of women had flexible schedules. *Id.* Incidents of jobs allowing telecommuting vary widely from industry to industry. The federal government reports that in 2004, forty-one percent of federal employees were eligible to telework, and of those, nineteen percent actually did. U.S. OFFICE OF PERS. MGMT., THE STATUS OF TELEWORK IN THE FEDERAL GOVERNMENT 2005, http://www.telework.gov/documents/tw_rpt05/status2005.pdf; see also FAMILIES & WORK INST., MAKING WORK "WORK": NEW IDEAS FROM THE WINNERS OF THE ALFRED P. SLOAN AWARDS FOR BUSINESS EXCELLENCE IN WORK-PLACE FLEXIBILITY (2006), <http://familiesandwork.org/site/research/reports/3wbooklet.pdf> (discussing various proposals to create a "culture of flexibility").

142. Michael Selmi, *Family Leave and the Gender Wage Gap*, 78 N.C. L. REV. 707 (2000).

143. *Id.* at 708.

144. *Id.* at 776.

145. *Id.* at 778.

who meet those responsibilities.¹⁴⁶ How that norm replacement will occur is less clear;¹⁴⁷ the methods may or may not create an issue for Catholic feminist legal thought. Again, however, I think more important than Catholic theory's agreement or disagreement with secular theory on any particular strategy for making the workplace more family-friendly is its enrichment of the grounds for arguing for such change, and hopefully the capacity to change the underlying views that allow subtle discrimination to continue to exist even in the face of legislation designed to secure certain rights.

C. *Recognizing and Valuing Home Work*

Catholic feminist legal theory and secular feminist theory share the concern that society fails to sufficiently recognize the value of work done in the home to care for families,¹⁴⁸ which contributes to the difficulty women have in balancing work and family. In the words of the *Compendium of the Social Doctrine of the Church*,

[t]he work of housekeeping, starting with that of the mother, precisely because it is a service directed and devoted to the quality of life, constitutes a type of activity that is eminently personal and personalizing, and that must be socially recognized and valued, also by means of economic compensation in keeping with that of other types of work.¹⁴⁹

In *Familiaris Consortio*, Pope John Paul II argued that "true advancement of women requires that clear recognition be given to the value of their maternal and family role, by comparison with all other public roles and all other professions."¹⁵⁰

146. See Joan Williams, *From Difference to Dominance to Domesticity: Care as Work, Gender as Tradition*, 76 CHI-KENT L. REV. 1441, 1474 (2001) ("The institutional arrangements people face in their work and family lives include, first, workplaces structured around an ideal worker who is not a primary caregiver."); see also Selmi, *supra* note 129, at 1557 ("[T]he workplace should be restructured to better incorporate the idea that workers have children and other dependents, and will need to spend time caring for those children and dependents."); Crittenden, *supra* note 88, at 258–68 (arguing that work should be redesigned around parental norms).

147. In her writings, Williams discusses such ideas as the claim that the ideal-worker wage must be jointly owned and that the workplace should be run by a principle of proportionality. See Williams, *supra* note 9, at 834–36.

148. In economic terms, society attaches zero value to homemaking and home child care. As Lisa Schiltz observes, "On a global level, the only forms of labor we acknowledge as contributing to the wealth of a nation are *monetary transactions*. The unpaid care work of women in their homes simply doesn't count, economically, because it is not paid labor." Schiltz, *supra* note 125.

149. COMPENDIUM, *supra* note 5, at ¶ 251.

150. Pope John Paul II, *Familiaris Consortio*, *supra* note 6, at ¶ 22. In *Laborem Exercens*, Pope John Paul II suggested that such value could be given by providing "family allowances or grants to mothers devoting themselves exclusively to their families." Pope John Paul II, *Laborem Exercens*, ¶ 19 (1981), available at http://www.vatican.va/holy_father/john_paul_ii/encyclicals/documents/hf_jp-ii_enc_14091981_laborem-exercens_en.html.

The concern of secular feminist theorists over society's failure to value work done in the home¹⁵¹ has led to various proposals that we attach an economic benefit to a parent who stays at home with a child.¹⁵² Martha Fineman, for example, suggests that society owes a duty of compensation and accommodation to those who do care work.¹⁵³ Similarly, Mona Harrington argues that care should be added "to the pantheon of national social values," and proposes that public support be extended to caregivers.¹⁵⁴ One suggestion is for the federal government to provide a "social credit," earned during periods when a parent is a full-time homemaker, which recipients could redeem to provide college education for the child, advanced study for the parent who stayed home or enhanced Civil Service status for a parent who took government employment upon returning to work.¹⁵⁵ These are proposals Catholic feminist legal theory would have no difficulty supporting.

Beyond this, however, the congruence between Catholic feminist legal theory and secular feminist theory gets a little trickier when it comes to recognizing and valuing home work. From a Catholic perspective, despite the essential contributions women make in the world of work, women who wish to do so should be free to stay at home and not enter the marketplace. In his *Letter to Women*, Pope John Paul II lamented that "the gift of motherhood is often penalized rather than rewarded,"¹⁵⁶ and in *Laborem Exercens* he argued that society must make it possible for a mother "to devote herself to taking care of her children and educating them in accordance with their needs."¹⁵⁷

Although secular feminist theorists are not likely to express outright disagreement with the statement that no woman should be forced to enter the workplace rather than stay at home with a child because of a financial inability to do so, I think they do have a great suspicion about whether women make such a choice freely, rather than seeing the choice as the prod-

151. See, e.g., Williams, *supra* note 146; Martha Albertson Fineman, *Contract and Care*, 76 CHI-KENT L. REV. 1403, 1405 (2001) (arguing for the need to restructure social structures in order to accommodate and value carework).

152. Although Catholic thought recognizes the need to value caretaking, it is not clear it would favor the use of the term "compensation." The Church values those who place "themselves at the service of others in their everyday lives" and views this as a fulfillment of vocation rather than as an economic transaction. Pope John Paul II, *Letter of John Paul II to Women*, ¶ 12 (June 29, 1995), available at http://www.vatican.va/holy_father/john_paul_ii/letters/documents/hf_jp-ii_let_29061995_women_en.html.

153. Fineman, *supra* note 10, at 18 (arguing that "caretaking work creates a collective or societal debt"); see generally Fineman, *supra* note 151 (expanding on idea of care and societal debt).

154. MONA HARRINGTON, CARE AND EQUALITY: INVENTING A NEW FAMILY POLITICS 48, 117 (Alfred A. Knopf, Inc.) (1999).

155. William J. Byron, S.J., *Children of Great Price*, AMERICA, Apr. 28, 2003, at 13-14.

156. Pope John Paul II, *Letter of Pope John Paul II to Women*, *supra* note 152, at ¶ 4.

157. Pope John Paul II, *Laborem Exercens*, *supra* note 150, at ¶ 19.

uct of social conditioning.¹⁵⁸ In addition, I think secular theorists have particular suspicions about statements by religious leaders on this subject, fearing that they are aimed at keeping women out of the workforce and in “the kitchen and nursery.”¹⁵⁹ As a result, some secular thinkers fear that any emphasis on “the importance of care work, and the need for women to have different relations to the workplace than men . . . is likely to reinforce existing gender stereotypes and seems unlikely to bring about greater equality for women.”¹⁶⁰

On one level, such sensitivity is not difficult to understand given the sense that conservatives have long promoted traditional family roles and minimized women’s role in the labor market.¹⁶¹ Having said that, a careful reading of Catholic Church statements on this subject make clear that the aim is not to keep women “barefoot and pregnant.” In the *Letter to the Bishops of the Catholic Church on the Collaboration of Men and Women in the Church and in the World*, then-Cardinal Ratzinger wrote of the need to keep in mind the interrelationship of family and work and the need to harmonize the needs of both.¹⁶²

In this way, women who freely desire will be able to devote the totality of their time to the work of the household without being stigmatized by society or penalized financially, while those who wish also to engage in other work may be able to do so with an appropriate work-schedule, and not

158. As one commentator observed,

[i]t is also fair to say that feminism has not fully accepted that, for the majority of women, the family remains the key to female identity, self-worth and commitment. Feminists have frequently portrayed marriage and family life, inspired and upheld by religious values, as a patriarchal conspiracy that renders women little more than domestic slaves.

Tina Beattie, *Feminism, Vatican-Style*, THE TABLET, Aug. 7, 2004, available at <http://www.thetablet.co.uk/articles/2190/>. As discussed earlier, see *supra* text accompanying notes 43–48, there is a great divergence between Catholic feminist thinkers and secular feminist thinkers about whether there are differences between male and female that are not simply a product of social convention and patriarchal influence. This difference explains why secular feminists might worry when they read Catholic writings that speak of women “fulfill[ing] their tasks in accordance with their own nature.” Pope John Paul II, *Laborem Exercens*, *supra* note 150, at ¶ 19.

159. Byron, *supra* note 155, at 15.

160. Selmi, *supra* note 129, at 1558. Selmi is concerned that efforts to allow women to spend more time caring for dependents will reinforce the idea that such work is women’s work. *Id.* at 1562.

161. Michael Selmi & Naomi Cahn, *Caretaking and the Contradictions of Contemporary Polity*, 55 ME. L. REV. 289, 290 (2002). Selmi and Cahn express concern that the “left’s carework proposals” similarly cut against the goal of equality. *Id.* at 290–91.

162. Joseph Cardinal Ratzinger, *Letter to the Bishops of the Catholic Church on the Collaboration of Men and Women in the Church and in the World*, (May 31, 2004), available at http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20040731_collaboration_en.html.

have to choose between relinquishing their family life or enduring continual stress.¹⁶³

To address the sensitivities here, it may help to speak of the value being advanced as that of stay-at-home *parenting*, recognizing that the stay-at-home parent may be a father as well as a mother. Thus, it is important that whatever specific proposals are advanced provide support to whichever parent chooses to stay home.

Still, it is likely that, given the ability of either parent to do so, more mothers than fathers will opt to stay home and care for children. In part this is true for economic reasons; given income disparities, there is likely to be a greater revenue loss where the father stays home than when the mother does.¹⁶⁴ In part it is true for cultural reasons, since "the culture of masculinity both devalue[s] carework and those who do carework."¹⁶⁵ Clearly, part of what is required is a change in culture, and the hope is that putting some economic value on homemaking will contribute to the change in culture. Even if it does not result in men deciding to forgo economic employment in favor of staying at home, were it to result in fathers taking a more active role in parenting, that itself would be beneficial, not only for children and the family¹⁶⁶ but also for bringing about greater gender equality.¹⁶⁷

Catholic feminist thought adds one other element to this discussion, that is, a sounder basis for arguing for societal support for care work. To explain why, take for example, Martha Fineman's argument that we ought to impose a "collective responsibility for dependency."¹⁶⁸ She proposes meeting that responsibility by providing for "the transfer of some economic

163. *Id.* at ¶ 13. The same letter observes that "[a]lthough motherhood is a key element of women's identity, this does not mean that women should be considered from the sole perspective of physical procreation." *Id.*

164. See, e.g., Maxine Eichner, *Dependency and the Liberal Polity: On Martha Fineman's The Autonomy Myth*, 93 CAL. L. REV. 1285, 1296 (2005) (discussing the fact that efforts to persuade men to do more caretaking work will not succeed unless disincentives to men doing so are removed, of which one of the most significant is "the substantial financial penalty that caregivers currently suffer in the labor market").

165. Dowd, *supra* note 91, at 445. Dowd talks about the experience of Europe, where providing economic support alone has not proven sufficient to ensure the participation of fathers in carework. See also Greenwood, *supra* note 127, at 323 (suggesting that until it is no longer the case that men are gendered into and out of caretaking roles, women will bear a heavier burden).

166. Dowd, *supra* note 91, at 442 (observing near universal agreement that "men's involvement in families is essential to children's well-being"). Michael Selmi, for example, who expresses great concern about emphasizing the value of care work, see *supra* note 160 and accompanying text, believes that a central need is to overcome barriers to workplace equality so that women will be in a better economic position to make effective and meaningful choices. Selmi, *supra* note 129, at 1558.

167. See, e.g., Selmi, *supra* note 129, at 1558 (expressing the belief that "an important component" of achieving gender equality is getting men "to shoulder more of the burden of home work"). But see Selmi & Cahn, *supra* note 161, at 305 (citing study finding that "[e]ven when parents share [parenting] responsibilities, they generally do not completely escape traditional gender patterns").

168. Fineman, *supra* note 10, at 16.

resources from the collective society to caretakers,"¹⁶⁹ without seeing that linked to any shared notion of what constitutes a family. One is prompted to ask two questions, neither of which has an easy answer. First, from where does collective responsibility come? Mere preservation of species¹⁷⁰ seems a slim reed and the mere fact that all human beings are dependent at some point in their lives¹⁷¹ does not by itself provide a justification for claiming a collective responsibility, especially one to care for those who may be perpetually dependent.¹⁷² Second, what is the scope of this collective obligation? That is, how much and to whom is the obligation owed?¹⁷³

Catholic feminist legal thought addresses both of those points. First, it provides a sound basis for imposing a societal obligation to support care work. Michael Selmi, commenting on Fineman's proposal, correctly suggests that the starting question is: what do we owe to each other?¹⁷⁴ Catholic thought, with its emphasis on interdependence and the common good, tells us that as humans we all share the obligation to promote the conditions necessary for all humans to flourish.¹⁷⁵ Second, Catholic feminist legal thought helps define the scope of the responsibility. As I have already discussed, Catholic thought puts family at the center of the concern and focuses on the viability of the traditional family.¹⁷⁶ It thus frames the goal in terms of what is necessary for family to serve its function in the world.

D. Postscript on the Role of Government and the Law

One of the important values of Catholic legal thought is subsidiarity. As expressed by Pope Pius XI in 1931,

169. *Id.* at 26. She suggests "the establishment of mechanisms that tax those who receive the benefits of caretaking in order to compensate those who do the caretaking." *Id.* Catholic theories would part company with Fineman here because her proposal is not linked to any shared notion of what constitutes a family. See *supra* text accompanying notes 40–41.

170. See Fineman, *supra* note 10, at 18–19.

171. See, e.g., MARTHA ALBERTSON FINEMAN, *THE AUTONOMY MYTH: A THEORY OF DEPENDENCY* (The New Press) (2004) (arguing that the state has an obligation to support caretaking based on the fact that dependency is an inherent feature of human existence); Kittay, *supra* note 41, at 527 (arguing that our shared experience of inevitable human dependency is the fundamental basis for a collective obligation).

172. As Michael Scaperlanda suggested in conversation subsequent to the Symposium, Professor Kittay appears to be "building her dependency care feminist project from her own preference for how the world ought to be ordered" rather than on a truth claim about human persons. See Michael Scaperlanda, *Dr. Kittay and the Anthropological Question*, *Mirror of Justice*, Mar. 20, 2007, http://www.mirrorofjustice.com/mirrorofjustice/2007/03/dr_kittay_and_t.html.

173. Michael Selmi asks some good questions regarding Fineman's proposal. See Selmi, *supra* note 129, at 1567.

174. *Id.* at 1565. Selmi answers the question in a much more limited way than would Catholic thought, suggesting simply that "women are entitled to the same choices that men have, with some necessary accommodation for childbearing." *Id.* at 1566. That is, he seems not at all bothered by the fact that there is a need to make trade-offs between work and family, merely that it is women that disproportionately have to make the trade-offs. *Id.*

175. See *supra* text accompanying notes 6–8.

176. See *supra* text accompanying notes 27–39.

[I]t is a fundamental principle of social philosophy, fixed and unchangeable, that one should not withdraw from individuals and commit to the community what they can accomplish by their own enterprise and industry. So, too, it is an injustice and at the same time a grave evil and a disturbance of right order to transfer to the larger and higher collectivity functions which can be performed and provided for by lesser and subordinate bodies. Inasmuch as every social activity should, by its very nature, prove a help to members of the body social, it should never destroy or absorb them.¹⁷⁷

Subsidiarity recognizes the “dignity of each individual, created in God’s image,”¹⁷⁸ which leads to a bias against collectivism.¹⁷⁹ As explained by the Congregation of the Doctrine of the Faith in its *Instruction on Christian Freedom and Liberation*,¹⁸⁰ the principle of subsidiarity means that

[N]either the State nor any society must ever substitute itself for the initiative and responsibility of individuals and of intermediate communities at the level on which they can function, nor must they take away the room necessary for their freedom. Hence the Church’s social doctrine is opposed to all forms of collectivism.¹⁸¹

Subsidiarity arguably should make Catholic feminist legal thought more hesitant about reliance on legal or governmental changes,¹⁸² especially in a situation like this, where what is ultimately required is social

177. Pope Pius XI, *Quadragesimo Anno* (After Forty Years), ¶ 79 (May 15, 1931), available at http://www.vatican.va/holy_father/pius_xi/encyclicals/documents/hf_p-xi_enc_19310515_quadragesimo-anno_en.html. See CATECHISM OF THE CATHOLIC CHURCH, ¶ 1883 (1993)

([A] community of a higher order should not interfere in the internal life of a community of a lower order, depriving the latter of its functions, but rather should support it in case of need and help to co-ordinate its activity with the activities of the rest of society, always with the view to the common good)

(quoting *Quadragesimo Anno*).

178. Joseph Cardinal Ratzinger, Congregation of the Doctrine of the Faith, *Instruction on Christian Freedom and Liberation*, ¶ 73 (Mar. 22, 1986), available at http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_19860322_freedom-liberation_en.html. See *supra* text accompanying note 47.

179. See Paul D. Marquardt, *Subsidiarity and Sovereignty in the European Union*, 18 FORDHAM INT’L L.J. 616, 619 (1994) (“Catholic social theory cast [sic] society as a complex web of family, social, religious, and governmental ties with the ultimate goal of encouraging and empowering the individual exercise of responsibility”); J. Verstraeten, *Solidarity and Subsidiarity*, in PRINCIPLES OF CATHOLIC SOCIAL TEACHING 133 (David A. Boileau ed., 1998) (observing that subsidiarity implies a rejection of collectivism).

180. Congregation for the Doctrine of the Faith, *Instruction on Christian Freedom and Liberation*, *supra* note 178.

181. *Id.* at ¶ 73.

182. What comes to mind in this context is, for example, a San Francisco ordinance mandating paid sick leave, which recently became effective. A number of states are planning to do the same. Teresa Baldas, *Mandatory Paid Sick Leave May Spur Suits*, NATIONAL L.J., Feb. 12, 2007.

change and conversion of heart.¹⁸³ The law may simply be too blunt an instrument with which to address the particulars of women's experience. However, while subsidiarity demands that we allow smaller collectivities to function where they are capable of doing so, it recognizes the need for the government to step in where nongovernmental approaches are insufficient.¹⁸⁴

CONCLUSION

Catholic feminist legal theory and secular feminist legal theory share a concern about the failure of the workplace to accommodate family life. That shared interest allows for a mutual support of many proposals to restructure the workplace and to value work done in the home. However, there are clear divergences. The primacy of the traditional family in Catholic thought, combined with an acceptance of immutable differences between men and women, means that there will be points along this road where the paths of Catholic and secular feminist will part company. It is my hope that beginning the process of identifying the points of convergence and divergence will lead to a greater dialogue between Catholic and secular scholars that will allow each to grow so that each may contribute more fully to the building of a more just and humane society.

183. I say this because of the fact that subtle discrimination persists, even in areas that have been addressed by statute. See, e.g., Reuter, *supra* note 108, at 1370 (discussing continued discrimination in practice despite passage of legislation such as Title VII of the Civil Rights Act of 1964, the Pregnancy Discrimination Act and the Family and Medical Leave Act).

184. I discuss this issue more fully in Susan J. Stabile, *Subsidiarity and the Use of Faith-Based Organizations in the Fight Against Poverty*, 2 VILL. J. CATH. SOC. THOUGHT 313 (2005).